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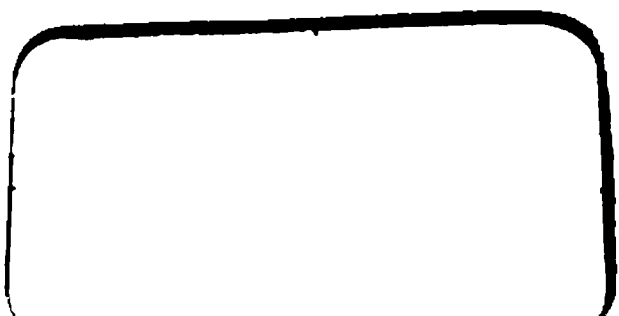
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# AMERICAN STATE TRIALS

*A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to the Present Day.*

**WITH NOTES AND ANNOTATIONS**

**JOHN D. LAWSON, LL.D.**

**EDITOR**

**VOLUME V**

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By JOHN D. LAWSON

W. A. R. O. I. O. R. O. W. A. T. S.

TO  
OLIVER HAYES DEAN  
OF KANSAS CITY  
MISSOURI

NOT ALONE IN RECOGNITION OF HIS LEADERSHIP AT THE BAR AND IN ALL CIVIC ACTIVITIES, BUT IN PLEASANT RECOLLECTION OF OUR MANY YEARS OF FRIENDSHIP AND OF OUR WANDERINGS BY LAND AND SEA FROM SAN SEBASTIAN AND THE BAY OF BISCAY TO THE MOUNTAINS OF GRANADA AND THE MEDITERRANEAN, THIS VOLUME IS AFFECTIONATELY DEDICATED.



## PREFACE TO VOLUME FIVE.

The trial of *Arrison* (p. 1) is the opening chapter of the story of a notable but not uncommon instance of the miscarriage of justice in the United States. The evidence of guilt is clear, and the crime being fresh in the minds of the community, the man is convicted and sentenced to be hanged. Then, on some technical grounds, his lawyers are able to have the proceedings set aside on appeal and a new trial ordered. A long time elapses; the community which, the day after the tragedy, offered large rewards for the discovery of the murderer, has ceased to have any interest in the case and has almost forgotten the crime, and a second jury is found which is persuaded that the prisoner is guilty of manslaughter only. His sentence is imprisonment for ten years and at the end of a portion of that time he is set free. He returns to Cincinnati, but finding that there are some people still living who remember the tragedy and its appalling circumstances and that they may take it into their heads to have him indicted for the murder of Mrs. Allison, he prudently departs for Iowa and is heard of no more.

How was it possible that twelve men could be found who could be made to believe that Arrison's act was without premeditation or deliberation, when he took several days to construct his infernal machine which he sent to his victims by his selected messengers? How little scruple he had about taking innocent lives in the carrying out of his revenge is shown in his advice to the boys to whom he confided the box, that they ought



to stay and watch it opened, for they would then see the prettiest thing they had ever seen in their lives—his object, of course, being to prevent their ever appearing as witnesses against him.<sup>1</sup>

The trial of *Thomas Maule* (p. 85) carries us back to the early times of the prosecution of the Rhode Island Quakers (1 Am. St. Tr. 813) and the Massachusetts Witches (*Id.* 514). As the old reporter points out, it is an exhibition of the independence of the jury of the law and the statutes, in striking contrast with the conduct of the jurors who followed implicitly the directions of the Court in the trials for witchcraft in 1692. Probably the general feelings of disapprobation with which the extraordinary proceedings in the conviction of the witches were regarded by the people generally did much to render these jurors independent of the Court and to cause them to rely on their own opinion and not on those of the Judges. The allusion of Maule to the Witch prosecutions was ingenious; and his whole defense proves him to have been a man of strong mind and not unworthy of the confidence placed in him by his own sect.

The great *Burdell-Cunningham* Case (p. 90) is still remembered by the generation fast disappearing, for it divided honors in mystery and in sensation with the Webster-Parkman tragedy in Massachusetts (see 4 Am. St. Tr. 93). It is not only one of the most notorious cases which the City of New York has ever known, but one of the most extraordinary in the annals of civil and criminal jurisprudence. Mrs. Cunningham was certainly an adventuress of the most sordid type, and, while she lost her case in the civil

<sup>1</sup> This fact does not appear in the report of the first trial, but is stated in Greve's History of Cincinnati.

court where she claimed to be the wife of Dr. Harvey Burdell, she won in the criminal court where she was charged with being his murderer. The evidence of her guilt is not conclusive to the mind of one reading the testimony, and her leading counsel, Mr. Clinton, who abandoned her when the bogus baby fraud came to light, nevertheless maintained to the day of his death that she was innocent of the capital crime. Mrs. Cunningham's public career, which opened with the most startling and thrilling tragedy, came to an end in the most thorough and disgusting low comedy.<sup>2</sup>

To convict the editor or proprietor of a popular city newspaper of the crime of libel is a difficult undertaking at all times and especially where the persons libeled are politicians or where the public is persuaded that the newspaper is being persecuted for its warfare against vice or official corruption. The counsel for the State in the trial of *Charles H. Grasty* and his associates on the *Baltimore News* (p. 216) showed very clearly to the jury from the law books, the statutes and the decisions of the highest courts what a libel was, and the defense did not succeed in proving the truth of the charges. The jury, notwithstanding this, acquitted the defendants. After all, a better definition of libel than any to be found in the treatises is that suggested by an English lawyer: "What is libel? Why, it is whatever twelve English shopkeepers declare to be libel."

The trials of the *Massachusetts Pirates* (pp. 330 *et seq.*), though they antedate those of the *South Carolina Freebooters* (4 Am. St. Tr. 652) more than a dozen years, are very like the Southern cases in all other features. The law was very stern, very swift

<sup>2</sup> Clinton, "Celebrated Trials," p. 279.

and very sure in those days, and after the trial court had passed on the facts there was no appeal to a higher court on technical points or to the Executive on sentimental ones. Convicted felons did not get their portraits in the newspapers and there were no flowers sent to them in their cells by admiring women. When, on June 30, 1704, Captain Quelch and five of his men were hanged on the Boston side of the Charles River, there was a great crowd to witness the spectacle, and among the spectators and upon a front bench was Chief Justice Sewall, one of the Judges of the Admiralty Court which had convicted the pirates, who did not think it beneath his dignity to be present. It was in those days considered a public duty to invest the scene of execution with as much awe as possible and it was believed that official station would serve to emphasize this feeling.

The wife of the Italian painter, *Lawrence Pienovi* (p. 359) was reputed to be a woman of remarkable beauty, and the husband's crime was for this reason one of the most insidious and malicious acts of revenge that has ever been conceived and perpetrated.

Unlike the case of Mrs. Cunningham (p. 90), the guilt of *Ann K. Simpson* (p. 369) seems very clear. But in the last half century has a Southern or Western jury ever sent to the gallows a young and beautiful white woman, even though she has poisoned her husband for the sake of a younger lover? The prosecuting attorney of a great Western city declared not long ago that he had given up the struggle, until the day when female jurors would mete out justice without distinction of sex.

It was for the freedom of the press and not for the cause of the Abolitionists that Elijah P. Lovejoy gave

his life, although later his name for the opponents of slavery became one to conjure with. The mob that attacked the warehouse in the little town of Alton did not know that it was making history, and when quiet had been restored in the community the issues were too great to be understood by the State officials. The law had been broken, they knew, and something had to be done, and the mountain labored and brought forth a mouse. They read like pages of opera bouffe—the trials of *Winthrop S. Gilman* (p. 528) and *John Solomon* (p. 589). The owner of the warehouse in which the printing press was stored, awaiting its delivery to the owner, is indicted with his friends who helped him to defend it from the mob, for the crime of riot. The Attorney General of the State appears and gravely argues that the Illinois statutes had repealed the common-law right of self-defense. The jury renders a verdict of acquittal, and then the leaders of the mob, who had set fire to the warehouse, destroyed the printing press and murdered the owner, are indicted for riot also. The jury, to keep things even, acquit the rioters. The first trial was a shameful insult to justice, the second was an impudent farce.

In an address to a St. Louis audience in 1888, Mr. Thomas Dimmock, who was a personal witness of much of the happenings in 1838, and who many years afterwards preserved the bones of Lovejoy and had them removed to another place, said:

The City of Alton has set apart a well located and spacious lot in the cemetery and an association has been organized and duly incorporated to erect a suitable monument. I have no doubt there will be sooner or later a monument worthy of the man and his deeds; but I do not expect to see it. My only desire is to make the surroundings of the present grave a little more attractive. When it is I shall feel that I have paid my share of the debt the country owes to Lovejoy.

Mr. Dimmock's hope and prophecy have been realized, for over the ashes of the murdered editor in the Alton City Cemetery there is now a public monument, erected at the joint cost of the city and the State of Illinois to the man who, in spite of threats and menaces of death, could calmly reply to his persecutors: "As long as I am an American citizen, and as long as American blood runs in these veins, I shall hold myself at liberty to speak, to write and to publish whatever I please on any subject, being amenable to the laws of my country for the same."

There is little doubt that, except among a small number of fanatical Abolitionists, the murder of Lovejoy called forth at the time little sympathy throughout the Union. His defense of freedom of speech was forgotten; and he was regarded almost everywhere as a disturber of the public peace and as one whose writings were threatening to break asunder the friendly relations existing between North and South. When the news reached Boston, at an indignation meeting called in Faneuil Hall by negro sympathizers, the Attorney General of Massachusetts compared the Alton Riot with the destruction of the tea in Boston Harbor, and declared that Lovejoy had "died as the fool dieth."<sup>3</sup> But in the sixteen years that had gone by when *Anthony Burns* (p. 645) was brought before the Federal Court as a fugitive slave, the opposition to slavery had greatly increased, especially in New England. When Congress passed the Fugitive Slave Law, which gave the slave-owner a right to follow his property into a free State and required the United States Courts to enforce his rights, the act was denounced by thousands of people throughout the North who believed that a

<sup>3</sup> Schouler, *Hist. U. S.* 300.

man held in bondage for no crime, but simply on account of the accident of his birth and the color of his skin, had a right to escape if he could. Among these thousands who would lift no hand to aid the slave-owner were some who were ready to resist the law with force and arms. Among them were men like Wendell Phillips and Theodore Parker, the first of whom, in public addresses, and the other in sermons filled with philippics against the Federal Judges and with very bad law, advised resistance to the hated statutes.<sup>4</sup> And when they, at the Faneuil Hall meeting, by their violent harangues incited the attack on the Court House and the killing of the United States Marshal, Batchelder, were they not legally as guilty of murder as were those Chicago anarchists who, thirty-two years later, were hanged for a precisely similar revolt against the laws of the land?<sup>5</sup>

Amiability and politeness, amongst the middle and lower classes, did not generally prevail in the good old days of yore, and the free use of the tongue gave rise to feuds and riots to an extent which it is difficult for us at the present day to realize. A scolding woman was treated as a high offender against the public peace and the authorities took care that a special and a very

<sup>4</sup> In a sermon on the "Function and Place of Conscience in Relation to the Laws of Man," preached on September 22, 1850, he said: "If a man falls into the water and is in danger of drowning, it is the natural duty of the bystanders to aid in pulling him out even at the risk of wetting their garments. We should think a man a coward who could swim and would not save a drowning girl, for fear of spoiling his coat. He would be indictable at common law." He was doubtless correct as to "natural duty," but any one-year law student would have told him that he was wrong as to the common law.

<sup>5</sup> See the Trial of Parsons, Spies, Fischer, Engel and others, 9 Am. St. Tr.

efficient form of punishment should be found for such kinds of transgression.<sup>6</sup> This was the ducking-stool. A Frenchman who traveled in England, at the beginning of the eighteenth century, gives this good description of punishment in that country of the scolding female:

"They fasten an arm-chair to the end of two beams twelve or fifteen feet long, and parallel to each other, so that these two pieces of wood with their two ends embrace the chair which hangs upon them upon a sort of axle, by which means it plays freely and always remains in the natural horizontal position in which the chair should be that a person may sit conveniently in it whether you raise it or let it down. They set up a post on the bank of a pond or river and over this post they lay, almost *in equilibrio*, the two pieces of wood, at one end of which the chair hangs just over the water. They place the woman in this chair and so plunge her into the water, as often as the sentence directs, in order to cool her immoderate heat."

And at the close of the eighteenth century an English poet wrote in praise of the ducking-stool the following lines:

"There stands my friend in yonder pool,  
An engine called the ducking-stool,  
By legal power commanded down  
The joy and terror of the town.  
If jarring females kindle strife,  
Give language foul or lug the coif:  
If noisy dames should once begin  
To drive the house with horrid din,  
'Away,' you cry, 'you'll grace the stool;  
We'll teach you how your tongue to rule.'  
The fair offender fills the seat  
In sullen pomp, profoundly great.  
Down in the deep the stool descends,  
But here at first we miss our ends.  
She mounts again and rages more  
Than ever vixen did before.  
So throwing water on the fire  
Will make it but burn up the higher:

<sup>6</sup> Andrews "Bygone Punishments."



---

If so, my friend, pray let her take  
A second turn into the lake;  
And rather than your patience lose,  
Thrice and again repeat the dose.  
No brawling wives, no furious wenches;  
No fire so hot but water quenches."

That good old Tory, Dr. Samuel Johnson, quite approved of it. When the Quakeress, Mrs. Knowles, complained that much more liberty was allowed to men than to women, the doctor replied: "Why, madam, women have all the liberty they should wish to have. We have all the labor and danger, and the women all the advantage. And we have different modes of restraining evil. Stocks for the men, a ducking-stool for women, and a pound for beasts."

The punishment of the ducking-stool gradually went out of vogue in England—as such things often do in that country without any express statutory repeal. About the time of the American Revolution it was in full play in most parts of England, but the last recorded use of it occurred at Leominster in 1809, when one Jenny Pipes was paraded through the town on the ducking-stool and ducked in the water by order of the magistrates. The old instrument of torture is still preserved in the village church, and the editor has himself seen another which is shown to visitors to the Church of St. Mary at Warwick.

Whether had the jury convicted them, the New York Judge would have sentenced the women, *Greenwault* and *Moody* (p. 710), to the ducking-stool, is a question which will forever remain unanswered; but that the offense was still recognized in New York, the Court had decided in the face of the protest of the counsel for the prisoners. It seems clear that the common-law crime of scolding and its penalty as well were

brought from England to New England by its Puritan settlers.<sup>7</sup> A writer on Curious Punishments states that as late as 1899 there were places in the United States where the ducking-stool was still a legal punishment. In 1889 the Grand Jury in Jersey City indicted a woman as a common scold and it was found on examination of the law that the offense was still a crime in New Jersey and that the ducking-stool had never been formally abolished.<sup>8</sup>

Another Enoch Arden case was that of *Richard Smith* (p. 713), but the missing husband was of a different type than was Tennyson's hero, for when he found an intruder in possession of his wife and family

<sup>7</sup> The old reporter who preserved the story of this trial was very indignant at the suggestion of the women's lawyers that the offense of scolding was not cognizable in the New York courts. "What!" exclaimed he. "Shall it be said that a common disturber of the public peace—a quarrelsome, turbulent and abusive woman, clamorous in and out of doors, at all times, is not to be restrained by the strong arm of public justice? The only objection we have ever heard urged against a prosecution for this offense is, that by the common law, the punishment prescribed on a conviction is the ducking-stool; and it is said, that according to our Constitution, 'no cruel or unusual punishments are to be inflicted.' But have not our courts the power, on a conviction for a misdemeanor, to soften the punishment, or substitute one adapted to the nature of our government? The descendants of the peaceable William Penn have so thought and so decided; for we understand from undoubted authority that the records of criminal jurisprudence in Philadelphia show that a prosecution for this offense has been sustained; and on conviction the defendant has been punished as for any other misdemeanor."

<sup>8</sup> "The early English settlers in the United States introduced many of the manners and customs of their native land. The ducking-stool was soon brought into use. At the present time, in some parts of America, scolding females are liable to be punished by means of the ducking-stool." Andrews' Curious Punishments, 274, citing Brooks (H. M.), "Strange and Curious Punishments." Ticknor & Co., Boston, 1886.

as well as his goods and chattels, he proceeded at once to dispossess him. The wife took the side of her newest husband, which doubtless drove him to murder, for which he was very justly hanged. The charge of the presiding Judge is of interest, as it contains one of the very earliest constructions of the Pennsylvania statute (the first in this or any other country) which abolished the common-law divisions of homicide, of murder and manslaughter and enacted degrees of murder—something which the law before this had not recognized.

We get a glimpse at the celebrated New York prison, the Tombs, and its police court methods in the case of *Magistrate Bogart* (p. 726). The “straw bail” on which he permitted a notorious character to escape not only punishment, but even a trial, showed a partnership between the Judiciary and the criminal classes which was to continue until the Tweed exposures a few years later drove the corrupt Judges of that city into retirement and disgrace.

A great case on the law of insanity is the trial of *Abraham Prescott* (p. 740) for the murder of his benefactress. The boy’s counsel, without hope of fee or monetary reward, made a strong defense, and their speeches to the jury have seldom been surpassed in a criminal trial in this country. The whole history of insanity and of the opinions of medical men up to that date were marshaled with great skill. And the charge of the Chief Justice was admirably fitted to bring the jury to the real issue and to prevent them from being influenced by either prejudice or sentiment. It is indeed a strong contrast to the “dumb charge” which obtains in many of our States. The lawyers made a strong attack on the death penalty, arguing even that in this Christian country it must be considered as be-

yond the power of a Legislature to enact; but the lengthy arguments on this point came to naught when the Judge told the jury that it was not his or their function to say what the law should be, but only to follow it as it existed; that in New Hampshire the law said that the murderer should be hanged and that was the end of it.

The defense that the prisoner was a somnambulist, had some facts to support it, and is one not often seen in a criminal trial. But a very recent case is reported in the current English law journals, in a prosecution growing out of the stringent rules that the war has made necessary in England. A young man named Zimmerman, a champion tennis player, who was the son of a naturalized German, had been convicted in a London police court and sentenced to prison for having trespassed on the line of a railroad, which is forbidden under the Defense of the Realm Act. His defense was that he and three of his brothers and sisters were addicted to sleep-walking, that they kept bells outside their bedroom doors to wake them if they attempted to walk out in their sleep, and that he had been the victim of a fit of somnambulism on the night of the offense. His defense was supported by the medical evidence of a specialist, and was accepted by the Appellate Court, which quashed the conviction.<sup>9</sup>

In what way does somnambulism excuse the commission of acts which, if committed by a person who is awake, would undoubtedly be criminal? for it cannot be said to be a form of insanity according to the expert evidence in the trial of Prescott. The answer is supplied by Sir James FitzJames Stephen in his *General View of the Criminal Law of England*. He there points

<sup>9</sup> *Law Journal (Eng.)*, July, 1915.

out that, wherever deliberate intent is an essential ingredient of a crime, the action consists of a series of stages, namely (1) occurrence to the mind of the contemplated action as a possibility, (2) deliberation, (3) resolution, (4) intention, (5) will, and (6) execution by a set of bodily motions co-ordinated towards the object intended. As Stephen points out, both (4) intention and (5) will must be present in order to constitute "criminal intent." They are different things, and "will" may be present without having been preceded by intention. "Secondly," he says, "will may exist without intention; the case is illustrated by the motion of an infant: a new-born child moves its hands and arms and lays hold of anything between its fingers. These motions are voluntary; probably somnambulism and other movements during sleep are of the same kind; they are voluntary, but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention." Hence it is that somnambulism, since it precludes the existence of intention, one of the essential ingredients of criminal intent, is a valid defense.

*Eli Hall* (p.903) most certainly took Johnson's watch against the latter's will and with no right to it. But his lawyers, after his conviction by a jury, went at once to that City of Refuge of criminals, an Appellate Court; and that tribunal succeeded in splitting some very fine hairs in letting him go free because he had accomplished his object with such speed. Had he held Johnson by the throat for a second while he pulled at the watch-chain, or had he shook his fist in his face and told him not to resist, he would have been a robber; but when he snatched it without doing this, even though he got what he wanted just the same, he was a perse-

cuted and innocent soul. The common law and procedure of England which became that of the United States, on our separation, was a mass of technicalities. It took the old country a good many years to see this, but more than half a century ago they were for the most part abolished there. We have clung to them with a reverence which would be laughable if it were not so serious. The editor long ago began the compilation of a Manual for the Criminal which, based on the decisions of our Appellate Courts, showed how almost any kind of crime could be committed without fear of punishment if only you went about it in the right way. But he never published it, because he considered that the good it would accomplish in calling the attention of the public to the woeful state of our law would be more than overborne by the knowledge which the lawbreaker would receive, a long, long time before our Legislatures would be likely to remedy the evil.

Across the canvas which depicts the trial of *Gerald Eaton* (p. 910) flits for a moment a brother of his victim, than whom, in his day, in the opinion of the populace, no greater hero was to be found on this continent. The "noble art" was at its zenith in the old country when John C. Heenan landed on its shores. A little later its supremacy in *le boxe*—as the French call it—was to leave England never to return, and, in spite of statutes and pains and penalties of the law, was to remain in permanence, it would seem, in the United States and was to produce a Sullivan, a Corbett and a Willard.

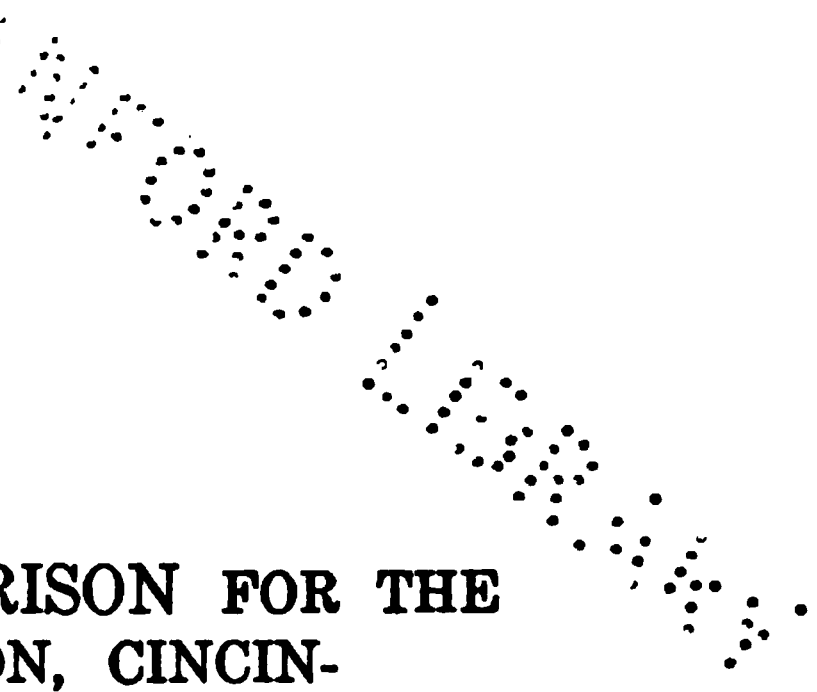
If the Northern States had in the first quarter of the nineteenth century abolished slavery, its people had not all given up the slave trade, the evidence in the trial of *Joseph Pulford* (p. 919) very clearly shows.

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## THE TRIAL OF WILLIAM ARRISON FOR THE MURDER OF ISAAC ALLISON, CINCIN- NATI, OHIO, 1854.

### THE NARRATIVE.

One evening on a street in Cincinnati a boy was stopped by a strange man, who asked him if he would like to earn a dime by carrying a small box to the address upon it. He said he would, and the man gave him the box and the dime. The box was about a foot long and six inches wide, was wrapped in paper and tied with a cord. On its top was a card addressed, "Mr. Allison, Marine Hospital." The boy took it to a store opposite the hospital and left it with the clerk there, who at once carried it across the street and handed it to Dr. Baker, one of the house surgeons, who was seated on the steps of the Marine Hospital with a colleague, Dr. Cummings. They looked at the box and read the address, and when one of them shook it there was a rattling sound.<sup>1</sup> Dr. Baker, thinking it was a present, carried it up stairs to Mr. Allison's rooms and handed it to his wife at the door. Mrs. Allison went into her room and gave the box to her husband who took off the string and was in the act of pulling off the sliding top when a tremendous explosion occurred. Dr. Baker, who was outside, rushed in, found the room wrecked and in flames and discovered Mrs. Allison badly wounded and her dress on fire. He tore the burning clothes from her body and other persons coming to the rescue the fire in the room was extinguished. Mr. Allison was then discovered in a fearful condition. His abdomen, hands and face were badly burned, his eyesight was gone and when he was removed to a hospital ward nearly two dozen balls, slugs and pieces of iron were found

<sup>1</sup> Dr. Cummings, p. 11.

in his body. He died that night at midnight, and Mrs. Allison succumbed three days later, after one arm which was almost torn from her body had been amputated.

At this time there was a student attending lectures in the Medical College named William Arrison. Allison was steward and lived in the College. While Dr. Baker was away on his vacation the previous summer Arrison had taken his place, and when Dr. Baker came back he found that Arrison and Allison had had a difficulty over a borrowed book in consequence of which Arrison had been knocked down by Allison. Arrison had subsequently stated to more than one person that he would kill Allison,<sup>2</sup> and when, after the tragedy in the hospital Arrison was missing and could not be found in the city, suspicion turned towards him as its author. Rewards were offered but without avail, until one day a letter from him which had been delivered in Cincinnati to the wrong address revealed the fact that he was in Iowa, where he was found and brought back to Cincinnati and indicted for the murder of Mr. and Mrs. Allison.

He was tried for the murder of the husband and a number of circumstances pointed directly and conclusively to him as the perpetrator of this terrible crime. The boy who had taken the box to the store testified that the prisoner was the man who gave it to him<sup>3</sup> as did also a youth who was with him at the time.<sup>4</sup> The box was not wholly destroyed and a carpenter and several of his workmen identified Arrison as a man for whom a few days before the tragedy occurred they had made the box which had contained the explosive.<sup>5</sup>

One witness swore that Arrison had tried to buy some gunpowder from him a few days before the explosion,<sup>6</sup> and another recognized the address on the card on the box as one

<sup>2</sup> Joseph Blackburn, p. 12.

<sup>3</sup> John King, p. 14.

<sup>4</sup> Gershon Somers, p. 14.

<sup>5</sup> John R. Hiveley, p. 12; Michael Travis, p. 13; Joseph Kane, p. 13.

<sup>6</sup> W. H. Adderly, p. 13.

which was written by him at the prisoner's request.<sup>7</sup> The jury found him guilty of murder in the first degree and he was sentenced to be hanged.

### THE TRIAL.<sup>8</sup>

*In the Criminal Court of Hamilton County, Cincinnati, December, 1854.*

HON. JACOB FLINN,<sup>9</sup> Judge.

*December 11.*

William Arrison,<sup>10</sup> having been indicted at the July term of the Criminal Court for the murder of Isaac Allison<sup>11</sup> and

<sup>7</sup> Samuel Robinson, p. 15.

<sup>8</sup> *Bibliography.* \*"The Infernal Machine Case. Trial of William Arrison, for the Murder of Isaac Allison. Before the Criminal Court; Judge Jacob Flinn. Reported by Leonard Woodruff, for the Cincinnati *Enquirer*. H. H. Robinson & Co., Printers. 1854."

<sup>9</sup> FLINN, JACOB. "Another eccentric character was the judge of the Criminal Court—Jacob Flinn. According to Judge Wright, his peculiarities were so great that it became necessary to abolish the court in 1854 to get rid of the judge." Greve History of Cincinnati.

<sup>10</sup> Arrison's father was a soldier in the American army in the war of 1812 with England, and was engaged in the battle of Lundy's Lane. After the war he settled in Delaware county, Ohio, where William was born in 1812. Some three or four years after this his father removed to Indiana; remained there for a short time only, and proceeded west to Illinois. He lived there a number of years, engaged in agricultural pursuits, and afterward took up his abode in Lee county, Iowa. William was brought up as a farmer until he was near twenty years of age, when he was sent to an academy at Quincy, Illinois. Here he remained for about a year and a half, when he departed by the overland route to California in 1848. He remained in California, engaged in mining, until the latter part of 1852, when he returned home, having accumulated a little money; and in the spring of 1853 he went to Cincinnati to study medicine, and became a student at the Cincinnati College of Medicine and Surgery. During that spring, and the following fall and winter, he attended lectures at the college, and part of the time was engaged as an assistant in a drug store on Sixth street, Cincinnati. For a short period he acted as house surgeon at the Marine Hospital, but left there about one month before the murder of Mr. and Mrs. Allison.

<sup>11</sup> Hamilton County, ss. The Grand Jury of the State of Ohio, within and for Hamilton county, upon their oaths, present that Wil-

his wife, was placed on trial today for the murder of the husband. He pleaded *Not Guilty*.

The *Prisoner* was brought in and took his seat behind his

liam Arrison, contriving one Isaac Allison, purposely and of deliberate and premeditated malice, to kill and murder, on the twenty-sixth day of June, in the year one thousand eight hundred and fifty-four, with force and arms, at the city of Cincinnati, in the county of Hamilton aforesaid, a certain wooden box, then and there containing an iron tube closed at both ends, and loaded and charged with gunpowder, and ten leaden bullets, and ten leaden slugs, which said box and its contents were then and there so constructed and arranged that whenever any person should attempt to open said box the iron tube aforesaid, loaded and charged as aforesaid, would thereby and instantly be exploded, and as well the said box as the said tube be broken into pieces, and the fragments of the said tube, together with bullets and slugs aforesaid, be driven and shot forth, did purposely and of deliberate and premeditated malice, send and cause to be delivered to the said Isaac Allison, in the city and county aforesaid, with intent that he, the said Isaac Allison, should receive the said box, and should attempt to open the same he, the said William Arrison, then and there well knowing that the said tube loaded and charged as aforesaid, with gunpowder, bullets and slugs, would be exploded whenever any person should attempt to open said box, and that the explosion thereof would kill every such person. And the said Isaac Allison, not knowing the said box and its contents to have been so constructed and arranged as aforesaid, nor that the said box contained the said tube loaded and charged as aforesaid, at the city and county aforesaid, by the procurement of the said William Arrison, did receive the said box, and did then and there attempt to open the same; and instantly upon the said attempt of him, the said Isaac Allison, to open the said box, on the day and year aforesaid, at the city and county aforesaid, the iron tube aforesaid contained within the said box, closed at both ends, and loaded and charged with gunpowder, bullets and slugs as aforesaid, was thereby exploded; and thereby as well the said tube as the said box was then and there broken into pieces, and the fragments of the said tube, together with the bullets and the slugs aforesaid, were then and there driven and shot forth by means whereof and by force of the explosion of the gunpowder contained within the said tube, eight of the said bullets and eight of the said slugs driven and shot forth as aforesaid, did then and there strike and penetrate the inside of the right thigh of the said Isaac Allison, immediately below the groin, then and there giving to him, the said Isaac Allison, in and upon the inside of his right thigh, immediately below the groin, sixteen mortal wounds, each of the depth of five inches, and of the breadth of one inch; and also, by means whereof, and by force of the explosion of the gunpowder aforesaid, one fragment of the said iron tube, driven and shot forth as aforesaid, did then and there strike and mortally lacerate the abdomen and bowels of him, the said Isaac

counsel. He was dressed in a suit of black, and wore a black cloth overcoat. His face had been shaved, with the exception of his whiskers, and he wore a more cleanly and cheerful ap-

Allison, for the space of six inches in length and breadth, and four inches in depth, of which said mortal wounds, and contusion, and laceration, he, the said Isaac Allison, from the said twenty-sixth day of June, in the year aforesaid, until the twenty-seventh day of June in the same year, at the city and county aforesaid, languished, and languishing did live; on which said twenty-seventh day of June, in the year aforesaid, at the city and county aforesaid, he, the said Allison, of the mortal wounds and laceration aforesaid, died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said William Arrison, him, the said Isaac Allison, in manner and form aforesaid, at the city and county aforesaid, purposely and of deliberate and premeditated malice did kill and murder, contrary to the form of the statute in such case made and provided, against the peace and dignity of the State of Ohio. And the jurors aforesaid, upon their oaths aforesaid, do further present that the said William Arrison, contriving the said Isaac Allison to deprive him of his life, and him, the said Isaac Allison, purposely, and of deliberate and premeditated malice, to kill and murder, on the twenty-sixth day of June, in the year one thousand eight hundred and fifty-four, with force and arms at the city of Cincinnati, in the county of Hamilton aforesaid, a certain wooden box, then and there containing gunpowder and ten leaden balls, and ten leaden slugs, and which said box, between said iron tube, so contained and loaded and charged as aforesaid, within said box, and the sides of the said box, was then and there also loaded and charged with gunpowder and twenty leaden slugs, which said box and its contents were then and there so constructed and arranged that whenever any person should attempt to open the same, the iron tube aforesaid, loaded and charged as aforesaid, as well as the gunpowder aforesaid, so placed as aforesaid, between the said iron tube and the sides of said box, would thereby and instantly be exploded, and as well the said box as the said tube be broken into pieces, and the fragments of the said tube, together with the bullets and slugs aforesaid, as well those within the said tube as those between the said tube and the sides of the said box, be driven and shot forth, did purposely and of deliberate and premeditated malice, send and cause to be delivered to the said Isaac Allison, in the city and county aforesaid, with intent that he, the said Isaac Allison, should receive the said box and should attempt to open the same, he, the said William Arrison, then and there well-knowing that the said tube, loaded and charged as aforesaid with gunpowder, bullets, and slugs, as well as the gunpowder aforesaid, so placed as aforesaid, between the said iron tube and the sides of the said box, would be exploded whenever any person attempted to open the said box, and the explosion thereof, to-wit: the iron tube, and the gunpowder between the said iron tube and the sides of the said box would kill every such person. And the said Isaac Allison, not know-

pearance than when he was brought out to plead to the indictments. He conversed in a low tone with his attorneys and brother, who sat by his side, and seemed perfectly calm and

ing the said box and its contents to have been so constructed and arranged as aforesaid, nor that the said box contained the said tube, loaded and charged as aforesaid, nor that the said box contained the gunpowder, leaden bullets and leaden slugs aforesaid, placed as aforesaid between the said iron tube and the sides of the said box, or any other deadly or hurtful instrument or substance whatsoever, afterwards, on the day and year aforesaid, at the city and county aforesaid, by the procurement of the said William Arrison, did receive the said box, and did then and there attempt to open the same, and instantly upon the said attempt of him, the said Isaac Allison, to open the said box, on the day and year aforesaid, contained within the said powder, bullets, and slugs, as aforesaid, and the gunpowder as aforesaid, so contained as aforesaid, between the said iron tube and the sides of the said box, were thereby exploded, and thereby as well the said tube as the said box was then and there broken into pieces, and the fragments of the said tube together with the bullets and slugs aforesaid, as well those within the said tube as those contained as aforesaid between the said tube and the sides of the said box, were then and there driven and shot forth; by means whereof, and by force of the explosion of the gunpowder contained within said tube, and by force of the explosion of the gunpowder contained, as aforesaid within said tube and between said tube and the sides of the said box, driven and shot forth as aforesaid, did then and there strike and penetrate the inside of the right thigh of the said Isaac Allison, immediately below the groin, then and there giving to the said Isaac Allison, in and upon the inside of the right thigh of him, the said Isaac Allison, immediately below the groin, sixteen mortal wounds, each of the depth of five inches, and of the breadth of one inch, and also, by means whereof, and by force of the explosion of the gunpowder aforesaid, one fragment of the said iron tube did then and there strike and mortally wound and lacerate the abdomen and bowels of him, the said Isaac Allison for the space of six inches in length and breadth, and four inches in depth of which said mortal wounds and laceration he, the said Isaac Allison, from the said twenty-sixth day of June, in the year aforesaid, until the twenty-seventh day of June, in the same year at the city and county aforesaid, languished, and languishing did live; on which said twenty-seventh day of June, in the year aforesaid, at the city and county aforesaid, he, the said Isaac Allison, of the mortal wounds and laceration aforesaid died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said William Arrison, him, the said Isaac Allison, in manner and form aforesaid, at the city and county aforesaid purposely and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.



composed during the impanneling of the jury, and listened attentively to the testimony of the first witness.

*A. J. Pruden*,<sup>12</sup> Prosecuting Attorney, and *T. A. O'Connor*,<sup>13</sup> Assistant Prosecutor, for the State.

*W. M. Dickson*,<sup>14</sup> *Thomas M. Key*,<sup>15</sup> *William Johnson*<sup>16</sup> and *Mr. French* for the Prisoner.

<sup>12</sup> PRUDEN, ANDREW J. (1818-1900.) Born in Cincinnati. One of seven children of Ebenezer and Mary (Leonard) Pruden, both of whom were natives of New Jersey. They came to Cincinnati by way of coach and flat-boat in 1808. Here Ebenezer Pruden followed the trade of brick mason, and much of his superior work is to be found in some of the finest old buildings of the city. He died in 1863, aged 87. The son after attending Woodward College, studied law with David Van Matre and was admitted to the Cincinnati Bar 1841. Member City Council 1846-1850. Prosecuting Attorney Hamilton county, 1850-1855—Police Judge 1855-1859. From that time to his death he practiced law in Cincinnati. "For years he was a leading member of the Presbyterian Church. In politics he was a strong Democrat but he never permitted his political sentiment to sway his judicial opinion. During his service in the City Council he was instrumental in securing the change from soft limestone to the boulder system of grading of the city streets, and he was one of the promoters of the building of the House of Refuge, the Hamilton County Infirmary and other public works. Judge Pruden is recalled by his fellow jurists as a man of great learning and judicial ability; by his fellow citizens as one of the most progressive and useful men of his day; and by his family and friends as an example of upright living and as an object of the tenderest memories."—Greve.

<sup>13</sup> O'CONNOR, TIMOTHY A. Born Cincinnati, Ohio. Educated at Springdale Academy and St. Xavier College. Studied law and entered upon the practice at Cincinnati. In 1852 he was appointed Assistant Prosecuting Attorney under Mr. Pruden, and served for a term in that office. In 1857 was elected Prosecuting Attorney, and in 1872 was elected a judge of the Superior Court of Cincinnati, and served for more than five years in that position. Was regarded as an able lawyer, and was especially so in criminal cases. He died in 1888.

<sup>14</sup> DICKSON, WILLIAM M. (1827-1889.) Born Scott county, Indiana, Graduated Miami University, 1846. In 1848 attended law school of Harvard University. In 1849 commenced practice of law at Cincinnati, and shortly thereafter was elected first prosecutor of the Cincinnati Police Court. In 1859 was appointed a judge of the Common Pleas Court of Hamilton county, Ohio, which office he filled with distinction. Resuming the practice of the law after the expiration of his term of office he speedily took a front rank in his profession. Presidential Elector for Abraham Lincoln, 1860. During the war he organized the first colored regiment, and was the confidential friend of Lincoln, Stanton, and Chase; spent a large part of

After a number of challenges, the following jury was selected: Wm. D. Hill, T. B. Weatherbee, Andrew J. Titus, Paul Hughes, Henry Rogers, Samuel Tomlinson, Hezekiah Bohman, Wm. Peirson, Jeremiah Musser, Samuel Patterson, William Lingo, Christian Zeigler, (Cincinnati).<sup>17</sup>

THE COURT instructed the jury, saying they would not be at liberty to converse with each other during the trial upon the case or to converse with any other persons; it would be contempt of court; and if any one approached them upon this subject, immediately report the same to the Court.

#### THE WITNESSES FOR THE STATE.

*Mr. Pruden.* Call Dr. J. W. Baker. intend to announce now what is charged against the defendant?

*Mr. Johnson.* I would like the prosecutor to state in some form the manner in which he intends to conduct the case. Don't you

*Mr. Pruden.* No, sir; I expect to prove everything in the indictment.

*Mr. Johnson.* We are desirous

his time at Washington, and had much to do in framing the Amnesty Proclamation at the close of the war. Was a frequent contributor to the press, and the writer of many pamphlets. Was killed October 15, 1889, by an accident on Mt. Auburn inclined plane railway.

<sup>15</sup> KEY, THOMAS M. The only judge of the Commercial Court of Cincinnati, organized February 4, 1848. A Kentuckian by birth, who came to Cincinnati in early life. He was very eccentric, although an able man. During the war he was associated with General McClellan as Judge Advocate General on the latter's staff. The stories told of his military service are numerous and amusing.

<sup>16</sup> JOHNSON, WILLIAM. "Moved to Cincinnati in 1839, after having taken some part in politics as a member of the State Legislature, and as Prosecuting Attorney of Carroll county. The first year of his residence here (1840) was taken up with the campaign for General Harrison, during which he made a great reputation as a stump orator. In the following year he was appointed United States Surveyor General, a position he held for four years. After this he was elected judge of the old Superior Court of Cincinnati. In 1850 he was nominated as the Whig candidate for Governor but was unsuccessful. After this he returned to the practice, where he was very successful, especially before juries. He was a man of most remarkable peculiarities of manners and dress, and very original in his style of oratory, and made a marked impression on all who heard him. In 1861 he removed to Washington, where he was appointed by President Lincoln on the Commission to revise the Statutes of the United States. He died in 1892 at the age of 88 years." Greve Hist. of Cincinnati.

<sup>17</sup> All the jurors except Zeigler were farmers from the county.

of hearing the prosecutor's announcement of the train of facts that he expects to prove in the case. We are entirely in the dark as to the proof, and think it no more than fair that Mr. Pruden should state what he expects to prove.

*Mr. Pruden.* I examined the jurors as to their convictions upon the guilt or innocence of the prisoner, and did not then see fit to occupy the time of the court in giving a narrative of the case.

*Mr. Johnson* read from section 10 of the Constitution of Ohio as to the manner of criminal trials. He said in some states the prisoner had a right to the plan of the prosecution, and all the facts of the crime alleged against him and the list of witnesses. He cited the practice of Massachusetts and Illinois, where the defense was furnished with a full and complete statement of the circumstances expected to be proved, and the list of witnesses, as was done in the case of Webster. We have no law in Ohio for this; but think it not right that the prisoner should be denied the poor privilege of knowing what was expected to be proved against him.

*Mr. Pruden* contended that the Constitution had been fully complied with. It had not been his practice to give a narrative of the case; he had stated the nature of the case, and did not see the propriety of making a statement in full. The prosecution is also in the dark; but few witnesses were examined before the grand jury, and out of the forty subpoenaed on the trial, I have not examined more than five. I do not desire to take any advan-

tage of the prisoner, or to do anything improperly.

*Mr. Johnson* said he referred only to the practice of other countries, and only asked that the prosecutor give an outline of the case.

The COURT said that it was simply a matter of courtesy between the attorneys; he thought, however, that an outline should be presented to the jury in cases of this kind.

*Mr. Key* asked that the prosecution make a general statement, not a detailed one, to the jury of the nature of the case.

*Mr. Pruden.* Out of courtesy to the gentlemen, I will make a statement. The prisoner, Wm. Arrison, was indicted in July last. It is charged that, on the 26th day of June last, he prepared a certain wooden box containing an iron tube; that it was loaded with leaden bullets and slugs, and so made that when any person attempted to open it it would kill them; that he sent this box to Isaac Allison, at the Marine Hospital, on the corner of Longworth street and Western row. It was directed to Isaac Allison; he opened it, when it exploded, throwing some eight or ten slugs in his right thigh, and a portion of the shell in his bowels, wounding him, of which wounds he died. We expect to show that the prisoner was at the hospital a short time previous to the 26th of June; that some difficulty occurred between him and Allison, when he was knocked down; that he went away and threatened to kill Allison, and prepared himself with a pistol, but afterward he got the box made. We expect to show where he got the box made,

where he bought the powder, and where he got the card directed. We expect to show that he went away. We expect to show that he changed his name and was only caught by the interposition of Divine Providence.

*Mr. Johnson* asked that the witnesses for both state and defense be requested to retire to a private room, which was ordered by the COURT.

*Dr. John W. Baker.* Am acquainted with prisoner; knew the deceased at the Cincinnati College of Medicine and Surgery, Longworth street and Western Row. He was steward there, and prisoner attended lectures; was house surgeon, but in February, being sick, I went to the country, and prisoner took my place. He had a difficulty with deceased while I was absent. After my return they had a quarrel in my room; do not know what it was about; prisoner left the college in June. On the evening of twenty-sixth June, about 9, while sitting on the pavement in front of the hospital, Charles Jackson handed me a box. It was about ten inches long, and four or five square, wrapped in paper, and tied with a cord. There was a card under the cord, but did not see if there was any writing on it. Took the box upstairs, and meeting Mrs. Allison on the stairs, I handed it to her, saying, "I suppose this is a present for you." She went into her room with it. Met my brother in the hall, and five minutes later, heard a loud explosion; it shook the building; there was smoke and the smell of gunpowder; heard screams of Mrs. Allison and saw my brother

carrying her from the room; her clothes were on fire; stayed with her for over half an hour, then went up-stairs, and saw Mr. Allison lying in bed in an adjoining room; he had an incision in the abdomen about three inches in length and one-half inch in breadth; the intestines were protruding; a number of bullets or large shots were in the thigh, which we extracted. He died that night about 12 at the Marine Hospital. The house was very much wrecked by the explosion.

To *Mr. Dickson.* The difficulty between the two occurred a month before the explosion; they spoke after that, though not very friendly; thought the quarrel I saw a momentary ebullition of passion; did not expect anything serious. Don't know that my brother borrowed money from Arrison; Arrison was a regular student; he was a peaceful, quiet man. Don't recollect that the faculty reported Arrison and Dr. Cummings as of equal standing when they were applicants for a position in the hospital. Was present when Allison died; he was in great agony. He knew he could live but a few minutes. Did not know Allison was expecting a package. Was with Mrs. Allison when she died, the next day about three. Did not hear her attribute the deed to anyone. Some ladies were with her. Handed the box to Mrs. Allison because Jackson told me to do so.

*Charles Jackson.* At Mr. Stockton's store, under the Marine Hospital, corner of Longworth and Western-row, between 7 and 8, a boy named King handed me a box; told him

I would deliver it. Shortly after I took it to Dr. Baker, who said there was sand in it; he shook it, said there must be something valuable in it. Dr. Cummings was present; the box was rather heavy, about twelve by five inches, wrapped in lead-colored paper, and tied with white wrapping cord. The card was addressed: "Mr. Allison, Marine Hospital, corner Western-row and Longworth." (The box and card were produced.)

*Dr. Thomas Cummings.* The card I saw was similar to this; can't swear it is the same writing. I had the box about an hour in the store. Arrison and I were fellow students; we roomed together in the Kline building, on Fifth near Sycamore; became acquainted with him in January, 1853, and with Allison in the winter. When Dr. Baker went away Arrison was house surgeon. Remember the first difficulty between the two. It was about a book that Arrison had borrowed from deceased and had injured in some way and Arrison claimed that Allison was charging him too much for it. The latter said he did so because he was a mean man, whereupon Arrison called him a coward and a lie was passed between them, and at last Allison knocked Arrison down. He fell as if he had been shot; made Allison quit, and got some water and revived Arrison. This was over a week before the explosion. The prisoner later said to me that he had a great notion to kill him but afterwards said it was foolish for him to say such a thing; was sitting at the hospital door with Dr. Baker when the package was handed to him; took it and shook it and

heard something like sand inside. There was a string around it and a card directed to Mr. Allison. Think that was the same card. Was on the pavement waiting for Dr. Baker to return when I heard the explosion. It was awful; rushed upstairs and saw Dr. Baker get Mrs. Allison out. The explosion did great damage blowing out windows and setting fire to the room. Saw Allison in the faculty room and he was very badly wounded. His face seemed burned, his intestines protruded and he was wounded in the thigh. He died in this building that night about an hour and a half after the explosion. The prisoner was a diligent student. We were roommates for two or three months when he took Dr. Baker's place as house surgeon. Allison was a student before he became house steward; don't know of any difficulty between deceased and Dr. Baker, or of his having advanced money to him. Think the explosion was about three weeks after the difficulty. Dr. Baker told Allison that he couldn't live when he said that this was the consequence of something wrong which had gone on. Can't recollect the exact words, but by inference was he said that if he had conducted himself right he would not have met with such a fate. He did not name anybody. Did not hear him name Connelly; did not hear him name Arrison. He suffered greatly. Saw Mrs. Allison before she died. When asked if she thought Connelly sent the box she replied—

*Mr. Pruden* objected.

*Mr. Johnson* thought Mr. Pruden was exhibiting a thirst for

blood when he endeavored to rule out the dying declaration of Mrs. Allison.

*Mr. Pruden* thought Mr. Johnson an abominable villain.

*Mr. Johnson* asked the authority for this assertion.

*Mr. Pruden* said his position at the Hamilton county bar warranted it.

The COURT. Go on witness.

*Dr. Cummings.* Mrs. Allison thought Connelly had something to do with it; had a hand in it. Said her husband thought so; never heard of Connelly before. Mrs. Allison never named Arrison from the time of the injury to her death.

*Joseph Blackburn.* Am studying medicine and stay in a drug store nights and mornings. Was acquainted with both deceased and prisoner. About a week after the fight in the hospital Arrison came into the store and said how Allison and Dr. Baker had treated him. He said, "Jake, I'll let Allison alone but if he ever comes across my path I'll kill him." The Saturday before the fight he borrowed a pistol from me but the Friday before the explosion he brought it back saying, "Jake, I didn't use it but I'll get even with him yet." Said he would have blown Allison's heart out if he had had the pistol the night of the fight. He said he was going to Iowa. He worked at the drug store from June to March last. We kept powder in the store. He wore a white hat and sometimes a blue and sometimes a black coat. He wore a hat like the one shown. He used to keep our books so I know his handwriting. We kept powder flasks and cans but no iron quicksilver bottles. Have seen Dr. Hall and Mr. True and

Mr. Mann in the drug store. On the morning after the fight Allison said to me that he and Arrison had a fight; that he never liked him; that they had words about a book; that he called him a blackguard, whereupon he, Allison, knocked him down. He said he wanted him out of the hospital, but that he could whip him anywhere. He afterwards said he would leave the hospital as soon as he could get his money from Dr. Baker. Showed me a note for \$500.00, money he said Dr. Baker had borrowed from him. Arrison once said that Allison followed him around the hospital like a thief and that if he recrossed his path again he would blow a hole through his heart.

*John R. Hiveley.* Am a carpenter of the firm of Hiveley & McCollough. The shop is on Fifth street. About the 21st of June last a man came into the shop about 10 o'clock; said he wanted a box made of a certain description. We took his order and had it ready for him that night. When he came for it he wanted a thin piece to fit inside the box and a hole in the center. Did this for him. He paid me \$1.25 for the box and asked to borrow a screwdriver which I loaned him. In the morning he brought back the box; said he wanted it lengthened, which we did for him. He took it away and on Saturday brought the screwdriver back. Did not know him then, but the prisoner is the man; I recognize him. He did not say what he wanted the box for.

*Cross-examined.* He said he wanted a tight, sliding lid. The pieces now shown me are parts of the box we made. I remem-



ber how he was dressed, black pants, white vest, white coat and white hat. Described him to the sheriff. He had no beard no whiskers, but his beard was several days old. Recognize him partly by his high cheek bones. I helped make the box and delivered it. It is difficult for a man not to know his own work.

*Michael Travis.* Worked at Hiveley's shop. A man came in one morning with a box; said it was too short. Said he wanted it strong to send away. Said he wanted a false lid made. Helped to alter it. That man (pointing to the prisoner) looks like him. Would not swear positively. Think he wore a black hat and black coat. Think that is the box we made. Arrison borrowed a gimlet and a screw driver. He returned the screw driver on Saturday morning.

*Joseph Kane.* Worked for Mr. Hiveley. Remember a man coming in to order the box and coming next morning to have it altered. Did part of the alteration. McCullough finished it. Saw the man three times. Think the pieces exhibited are part of the box. Don't remember that Mr. Hiveley was present just then.

*Dr. Joseph M. Locke.* I am an analytical chemist; examined pieces of the box and iron. Found on them sulphate of potash, which is produced by the burning of gun powder.

*George W. Hand.* Became acquainted with prisoner by dealing with him at a drug store; am a house painter. On Thursday before the explosion went into Harrison's shop on George and Mound streets. Prisoner was there. He was planing the

lid of a wooden box. He said it wouldn't fit. I got a chisel and fixed it for him. The piece I fixed is that before me now. Know the piece from the manner in which I gouged it out. It had a false lid—a board with a hole in the center. Was in Chicago in June. Did not help to arrest Arrison. Was there with Mr. Bruen. Went to Keokuk where we found Arrison. Have not made a bet that I would hang the prisoner. I said one day in Mr. Remlin's store, "I will bet he is not hung." Have not said that Arrison could read Shakespeare better than any public reader. Had heard him read at Salisbury's store. I described the box before I saw the pieces. Asked Arrison in the shop what he was making. He answered, "Ask me no questions and I'll tell you no lies." Afterwards he said he was making it for his nieces or cousins in Iowa. Think he had striped pants on when he came into the shop.

*December 13.*

*William H. Adderly.* Kept a drug store at the corner of Sixth and Mount streets. Thursday or Friday before the explosion the prisoner came in and asked for a package of gun powder. Said I did not keep it. He said a sign outside said we had a license to sell gunpowder. I told him no, when he went out and looked, then came in and said it was "Bluelick and Soda Water." Asked me for some strong twine. Had none strong enough for him. Told him he could get it at the grocer's opposite, which he did. Had seen the prisoner before the day I mentioned. He had on a white hat and black or blue coat. Did not notice his

vest. Am sure he is the man. Noticed that he had not been shaved for some time.

*Dr. O. M. Langdon.* Was called to see Mr. Allison. Dr. Smith was dressing the wounds. Did not see his leg. The wound in the abdomen was fatal. The house was horribly wrecked. Asked him if he knew who did it. He said he did not as he had no enemy in the world. Mrs. Allison named no one. Said she would rather die than live if her husband died.

*Samuel Cloon, Jr.* Was in Adderly's drug store when a man came in and asked for some twine. Bill Porter was there too. I said, "Bill, who was that?" He said, "That was the celebrated Dr. Arrison." The prisoner in the box was the man I saw.

*Henry E. Porter.* Am a brick-layer. Was in Mr. Adderly's store on the twenty-second or twenty-third day of June and confirm what has been testified to by Mr. Adderly and Mr. Cloon.

*David McCullough.* Am a carpenter, partner of Mr. Hiveley. Last June a man came in and ordered a box made. He said he wanted a strong one that would stand dumping about. I made the box according to his order. The remains of that box are those produced. Described the box to the chief of police before I saw the remains. Went to the jail with Mr. Pruden and pointed out the prisoner as the man who ordered the box.

*Dr. J. B. Smith.* Was called to attend Mr. Allison the night of the explosion; found the intestines protruding and a half a dozen wounds in the thigh. Some were from slugs and some

were from round bullets. He lived about two hours. The wound in the abdomen was fatal. Was with Allison when he died. Drs. Baker and Lawson were there. Allison said the cause of his injury was a torpedo which was sent to his room and had exploded. Dr. Baker asked him if he knew whence it came. He named a man named Connelly from Philadelphia, or New York. Did not hear him say anything of his past life or of criminal associations or that this was a result of a life of crime. I helped to amputate Mrs. Allison's arm. She was under opiates. Her faculties were not perfect.

*John King.* Am fourteen years old. On the night of June 26th, was on Plum street with another boy and a man came along and asked me if I wanted a job. I said yes, and went with him. He gave me a box and told me to take it to the hospital to Mr. Allison. He gave me a dime. Took it and gave it to a young man named Jackson. When I heard of the explosion I went to the hospital and said I was the boy that brought the box there. It struck me that the box did it and I heard the police talking about a box. They asked me what kind of a man gave it to me. They brought several men and asked me if he was the man. I said no. Think the prisoner is the man who gave me the box. It weighed about twelve pounds. Can read writing. Read the name Allison on the card. The card shown me looks like the card.

*Gershon Somers.* Was with John King when a man stopped us and told us to take the box to the hospital. We gave it to



the boy at the store underneath. The box was heavy, wrapped in black paper and a string around it. The prisoner looks like the man.

*N. D. Gould.* Reside in Boston. Teach handwriting and have had experience in judging it; think these papers shown me as read by defendant and letter sent from Iowa are in the same hand; was a witness in the Dr. Webster case and in numerous other trials.<sup>17a</sup>

*Benjamin C. True.* Am an engraver. Was at Mr. Holt's engraving rooms about 3 o'clock on June 26th, when a man came in and asked for a pen to direct a card. Mr. Robinson gave him a pen but the man asked him to direct it for him, which he did, to Mr. Allison at the Marine Hospital. Asked the man if he was connected with the hospital. He said no. Asked him some questions about the cholera and he told me of different treatments. Thought I had met him before and then recognized him as a man I had seen at Dr. Salisbury's store. The prisoner is the man who got the card written. Have no doubt of it. The card produced looks like Mr. Robinson's writing. The card is the same size. Have been a gunmaker.

*Cross-examined.* Remember at Dr. Salisbury's store the time I saw the prisoner, a lady came in complaining of a toothache and that the doctor pulled out the wrong tooth. Do not remember how the prisoner was dressed. First he told me he wasn't connected with the hospital and afterwards that he was. Recognized Arrison when I saw him arraigned for trial.

*Samuel Robinson.* On the 26th June, about 2 o'clock, a man came into my store. He gave me a card and asked for a pen to direct it with. Asked me to write it, telling me to direct it to Mr. Allison at the Marine Hospital. He talked to Mr. True and myself. He told about the cholera. This is the card I wrote. It is my handwriting. The prisoner is the man I wrote it for.

*James L. Ruffin.* Am City Marshal. Was in Marsh's drug store the day after the explosion. Saw the piece of walnut box. Hand said he had gouged out a lid for a man but did not know his name. Saw the letter produced in Dr. Vattier's hands. Asked Arrison if he had directed the letter to his brother who had assumed the name of Willard. He said he did. Told him the letter had been opened by mistake and had led to his arrest.

*Cross-examined.* Saw Allison before his death. Asked him who did it. He said he thought a man named Connelly did it. He seemed to be under great mental anguish. When I first saw Arrison his hair met on his eyebrows: there was no division between them.

*Dr. D. M. Holt.* I lived in Cincinnati formerly and had my office in Salisbury's drug store. Saw prisoner and Mr. True in the store the day the woman's tooth was drawn by mistake. They were laughing about it. Knew prisoner for about a year and a half. Thought him studious and of good reputation. Never saw any evidence of a cruel or wicked heart. He was

<sup>17a</sup> See 4 Am. St. Tr. 93.

fond of reading aloud, but did not consider him a remarkable reader.

*W. W. Black.* Was at the Marine Hospital the night of the explosion. Went through the room where it took place. Picked up a card and showed it to Dr. Lawson. The card produced is the same. Think it was found in the middle of the room.

*Mr. Pruden* suggested that as some of the jurors desired to go home and as it was now near 6 o'clock the court should adjourn.

*A Juror.* I can't get any conveyance home tonight and it will take me until 9 o'clock to walk there. I will have to leave at 6 o'clock in the morning to get here in time, leaving only the middle of the night to tend to family matters.

The COURT ordered the adjournment to 9 the next day.

*December 14.*

*Miles Greenwood.* Am engineer of the fire department. On the night of the 26th on the alarm of fire we went to the hospital. Everything was in confusion. The side of the room was torn out and the windows also. Have been an iron founder. This looks as if it had been a gas pipe with the ends welded. Suppose there were slugs inside of this pipe. The remains of the box weighed about four pounds. Heard Allison say that it was a cruel way to treat a man. He did not name anybody.

*Joseph Lewis.* Was one of the first after the explosion to get to Allison's room. He was endeavoring to crawl to the window. I got assistance and carried him into another room. He said this is what I get from

some of my friends. He was terribly wounded and was holding his entrails in by his hand.

*Jesse Worlay.* Am Deputy Marshal. Picked up in the room at the hospital some of the pieces of the box that are here. Did not hear Allison name Connelly. He said a box exploded and killed him.

*Theodore Marsh.* Am a druggist near the hospital. Hand came to my store and told me he gouged the lid out of a box for a man named Arrison.

*C. F. Willard.* Am an attorney. Received the letter shown to me on Friday, 12th of November. Opened it and found it was not for me, so returned it to Mr. St. Clair, the deputy postmaster, who read it.

*Capt. D. T. Hoke.* Am chief of police. On the evening of the explosion saw Mrs. Allison lying upon a table in the hospital. They had just amputated her arm. There was great confusion and destruction. Mr. Hivley gave me a description of the box and the man. Received information that Arrison was in Iowa where his parents lived, from Mr. French, one of his attorneys. Went there with Mr. Ruffin. Visited his father's house in Keokuk, but did not find him. Then went to St. Louis. Mr. Ruffin told me about the letter. Was shown it by the postmaster. We then started for Muscatine. Inquired for a man named Willis at the post office. The post office gave me a description and I said that's the man. Got a warrant of arrest for Willis, alias Arrison. Went to a drug store to see if I could find Arrison. He was sitting with his back toward me reading a paper. I said, Willis, here is

a warrant. He said I was mistaken in the man. Remarked that it was hard he should be kidnaped. We took him to a hotel. He said to the mayor, If I go back to Cincinnati I will be given into the hands of thieves, cut-throats, and robbers. He denied he was Arrison. Asked if we would let him go if he proved he was Willis. I said no. Examined his trunk. On everything his name was erased.

*Dr. J. L. Vattier.* Am post-master in this city. This letter was returned by Mr. Willard. I read it to the marshal and gave it to the prosecuting attorney.

*Christian Burkhardt.* Have been in business for many years and have examined many documents. In my opinion the letter from Muscatine and the papers written by Arrison are in the same handwriting.

*Dr. C. C. Chapman.* Was a professor in the medical college. Knew the prisoner when he was a student. He often wore a white hat and a blue frock coat. Did not know anyone in Muscatine by the name of Willis.

*Lewis P. Lee.* Went with Capt. Hoke and the mayor to find Arrison. He denied that that was his name. I told him his heart was blacker than his coat. He

denied until he got here that he was Arrison.

*John Cooper.* Prisoner stayed at my house in the summer. One night he told me about a difficulty he had had. He was restless and walked about the room. He said he couldn't sleep. Said he had difficulties with someone.

*Lewis French.* Am an attorney of the prisoner. He engaged me to collect a claim against Drs. Baker and Lawson, a note for \$500. I got judgment against them. He complained he could not get the money from the doctors. His father wrote to me to know if he would have a fair trial. I answered that the excitement was great but after it subsided I would advise him to give himself up and stand his trial. Did not advise him to change his name nor to erase his name from his clothes. Every person who visited the hospital was shocked at the crime. As a member of the city council I voted to offer a reward for the arrest of the perpetrator. The excitement was such that whether guilty or not guilty I did not think the person charged would be safe in this city. I have seen the letter before that is now handed to me.

*Mr. Pruden* here read the intercepted letter:

Muscatine, October 30, 1854.

Mr. Willard—Dear Sir: Since you left I have thought of some things that may be of advantage to you in your investigations. Do not omit calling on Dr. Chapman, Ohio College Building; he is my friend. Do not approach him only in your true character; make a frank statement of your business, and ask for his advice. Operate on his sympathy, if possible. You may find the new street directory of invaluable service to you in finding these; you get the names of, and not the number of their residence.

If you call on Mrs. Curtis, or Cooper's family, walk in without ceremony, introduce yourself; make your business known; say you

are anxious to get light on the subject; express your regret, etc., but don't stay over one hour at any time, and not that long, unless they appear to be sympathizers. Never call more than the second time unless pretty strongly invited. I think it would be as well to call on Mrs. Curtis, corner of Sixth and Freeman streets; Mrs. Campbell, No. 353 Sixth street, and the Cooper family, corner of Third and Park streets. I have reason for thinking they are my friends. Possibly they may know of something which may be of advantage to me. If they know anything against me I wish to know it.

Just say to these you wish to hear their real sentiments. Save all the money for me you can, yet do not omit anything of service to me on that account. Yours, etc. Willis.

P. S.—Scrutinize Mr. French very closely. Do not stop short of complete satisfaction why he has not obtained judgment on the note. If he fails to give that, you had better take counsel of some legal man what course to pursue. In such a contingency Charles Allyn would be as good as any I know of. Do not omit writing at least every other day, if you have difficulty, and let me know the nature of the same. W.

P. S.—The letter you mailed here for the old man I look on as very imprudent. If my watchers are sharp at all, it may lead to serious consequences. There is not so much danger of the letter being purloined, as in the post mark. Spies may be sent here on suspicion that the letter was from me. Attention should not be drawn to this point. This has troubled me night and day since you left. W.

P. S.—October 31.—You know yesterday was Sunday; of course no use to mail a letter on that day. This morning is rainy and disagreeable; business, however, is rather brisk. W.

*Philip Wetherbee.* Was at the scene immediately after the explosion. Saw Dr. Baker come down stairs with Mrs. Allison. Was with Allison when he died. In the room where the explosion took place saw a card under some rubbish. Picked it up. Showed it to Dr. Baker then gave it to Dr. Lawson to keep. The card shown is the one I picked up.

*Dr. B. S. Lawson.* Mr. Wetherbee handed me the card produced. I gave it to the marshal to keep. Am a professor in the college. The different members of the faculty have a proprietary interest in it. Was

with Allison before he died. He said he expected a man in Philadelphia committed the deed. Said there were difficulties and animosities between Connelly and himself and he believed he did it. Could not get him to tell the ground of the difficulties. He knew his injuries were fatal when he said this.

*Dr. Salisbury.* Prisoner was in my employ for nine months. I kept powder in different size packages. He had access to it. Dr. Holt had his office with me. Mr. True was sometimes in my store. Prisoner was a man of good character and attentive to

his business. Never heard him read aloud much. My impression is that I drew a wrong tooth for a lady once, but don't re-

member whether Mr. True was present. Arrison used to read aloud in the store from an English reader I had there.

*December 15.*

#### WITNESSES FOR THE DEFENSE.

*Dr. A. H. Baker.* Have been attending court since the case opened. Am a professor of medicine and surgery in the Cincinnati College and proprietor of the hospital. Allison had been a student. He occupied a vacant room in the college at his request. Then I made him steward. He was about to leave the hospital when the explosion occurred. His wife said to me that there must be some enemy in the city hunting him up. I had been told some tales about his having been arrested in Cincinnati and being in the watch house. When he first came he placed some funds in my hands. I paid from this his college fees and gave him money on account. Probably I owed him something at the time of the explosion. Was in the hospital when it occurred. When I entered Allison's room he was lying against the wall, his shirt bosom was on fire. Felt his entrails protruding. I said, "In the name of God what did this!" He said a torpedo in that box. Heard Mrs. Allison screaming, "For God's sake come in here." Allison said, "Doctor go to my wife." Couldn't get in her room for the partition was blown out and the hole filled with rubbish. Went round about to her room. Found her clothes on fire and her arm blown off. Carried her to the other room and assistants and patients got water and put out the fire. First at-

tended to Mrs. Allison. Then went to Allison's room. He was on a table. He said, "Doctor, can I recover?" I said it is impossible. He said, "How long can I live?" I replied, "You might live till morning and you might live three hours." He inquired for his wife. Told him she was badly hurt. He was in great pain. Some one asked him who did it. He said, "I think a man named Connelly." Asked why, he said, "I am perhaps the only witness against Connelly in a matter and he may want me out of the way." I said, "What was it?" He said perhaps a penitentiary offense. He was sinking at the time and was flighty. Don't remember his saying, "I know that he did it." Think he said he did not think that Connelly would resort to such base means. Allison lived about three hours after the explosion. Asked him if he had anything more to say. All he wanted was his wife cared for. We did not tell Mrs. Allison of her husband's death. She said if Mr. Allison died she did not want to live.

*Dr. Elijah Slack.* Am a professor in the Medical College; have had frequent opportunities of observing the prisoner. He was attentive and diligent. His general character was good.

*Thomas Meara.* Am a watchman near the hospital. Was there after the explosion. Heard Allison say there was a man in

New York that did it. He said as he began to open the box, he saw that it was a torpedo but it was too late to push it back.

*Dr. Joseph M. Cooper.* Have known prisoner a year. Saw him once or twice a week. Never heard anything against his character or saw him in a passion. Believe his habits were good.

*Dr. Thomas Ward.* Am professor of anatomy in the Medical College. I am in the habit of making examinations with microscopes. Made such an examination between the prisoner's eye brows. Saw no evidence of hair growing there. It would be easy to detect with the microscope if the hair had been taken out.

*John C. Lefler.* Heard Mr. Hand say that he saw ten or fifteen persons in the drug store to hear Arrison read; that he read Shakespeare. Don't think Arrison is a good reader. Don't know that Mr. Hand is an educated man. Prisoner is not a man of quick temper.

*Joseph Blackburn.* Have heard defendant read. He is not a very good reader. He has a stoppage in his speech.

*Paul Renlin.* Know George Hand. In my store one day he offered to bet Mr. Daniels that his testimony would convict Arrison. Heard him say that he would be hung.

*William Daniels.* Hand offered to bet me \$50 that his testimony would convict Arrison before any sensible jury. He did not show the money.

*John I. Riley.* Am a carpenter. Have known George Hand for four years. Boarded with him for six months. His char-

acter for truth or veracity is bad.

*S. B. W. McLean.* Am collector of this port. Was in Allison's room after the explosion. Heard Allison say, "This is all through malice. I wrote a letter two or three weeks ago to a man in New York by the name of William Connelly at 159 Greenwich street. I owe no man ill will—I am unmanned—my manly principles—for fear I would reveal something." I wrote this on the wall while he was saying it and afterwards transcribed it on a piece of paper. The sentences were detached. He asked Dr. Baker if there were any hopes for him. He said no. He asked him what the crime was. He said a penitentiary crime.

*Mr. Pruden* permitted the *Counsel for the Defense* to read a certificate from fifteen or twenty witnesses of Quincy, Illinois, to the effect that while Arrison was a student in that city he was of a mild and amiable disposition and had an excellent reputation.

*Jephtha Arrison.* Am a brother of the prisoner. Live in Iowa. My brother was born Delaware county, Ohio; lived there six or eight years; my father was an officer in the United States army in 1812; subsequently he became a farmer; then went to Indiana, and then to Illinois, and then to Lee county, Iowa, where he now lives; William left home to go to school at Quincy; he remained at Quincy about eighteen months; he was acquiring an education for the purpose of studying law; he then went to California; I went with him; we reached there on the 21st of August, 1850; were



engaged in mining; we stayed there about two years; William returned about May, 1852; he went to California to get money to complete his education; he went to his father's in Lec county; he then came to Cincinnati, for the purpose of getting into a law office; I received a letter from him stating that he had commenced the study of medicine; my object in this city was to settle up his affairs and ascertain if he could return here and have a fair trial; I never had any apprehension of his guilt; our correspondence was conducted in assumed names for secrecy and to settle up his business; saw Mr. French's letter at my father's; he advised him to keep away for any person charged with such a crime would be convicted, whether guilty or not; with persons I done business with, I gave my true name; at my boarding house I gave an assumed name because I did not want to be questioned; at Mus-

catine he wished to return and give himself up, as I was coming here; I advised him to remain until he got his money, and I ascertained the state of public sentiment; my brother and the family are in moderate circumstances; we are medium farmers; there is some seven or eight years' difference in our age; I am older; I was with him at Quincy; between 1840 and 1847 I was not with him; was with him nearly all his life with this exception; always knew him to be of a mild disposition, but rather impulsive; thought he was not frequently secretive enough; never saw anything vindictive in him; he spoke of the Webster case, and had but little charity for Webster; he thought that a person ought never to give way to their passions; he would become angry at times, but was soon over it; he had no turn for mechanical contrivances; the hair between his eyes has always been as it is now.

### THE SPEECHES TO THE JURY.

MR. O'CONNOR FOR THE STATE AND MR. DICKSON FOR THE DEFENSE.

*Mr. O'Connor* commenced his address by referring to the manner of impanelling the jury, and the rights allowed the defendant for protection; he proceeded to read the indictment, which he said was complete, and contained a statement of facts of the murder, as had been elicited by the evidence in the case. The counsel for the defense have admitted the law upon the subject of the death-blow being given in the absence of the actual perpetrator, and through an innocent agent. *Mr. O'Connor*, after reading opinions upon circumstantial evidence from Chief Justice Gibson, and also Chief Justice Shaw in the Dr. Webster case proceeded to review

the testimony. He argued at length upon the overwhelming chain of circumstances in the testimony that pointed to the prisoner as the identical person who concocted the infernal machine and caused the death of Allison. He dwelt upon the positive and direct evidence of the making of the box, its delivery at the hospital, the writing of the card and the being recognized by several witnesses, and the marked identification of Arrison in connection with the manufacture of the box and the writing of the card.

*December 16.*

*Mr. Dickson* complimented the Assistant Prosecutor for the terseness and ability of his argument and the absence of passion or vehemence against the prisoner. He urged the serious consideration of the case by the jury; that they should hear diligently all that should be said, and pay marked attention to every circumstance connected with it.

He then proceeded to argue to the jury that circumstantial testimony could not be conclusive, and cited the case of Thomas Harris, who kept the "Rising Sun," a public house, about eighteen miles from York, on the road to Newcastle. Harris had a man and maid servant; the man, whose name was Morgan, he kept in the threefold capacity of waiter, hostler and gardener. James Gray, a blacksmith, traveling on foot to Edinburg, stopped at Harris', supped and lay there. Early in the morning, Morgan went secretly to a neighboring magistrate and gave information that his master, Harris, had just then murdered the traveler, James Gray, in his bed. A warrant was issued and Harris was apprehended. Harris positively denied the charge, and Morgan as positively affirmed it, deposing that he saw Harris on the stranger's bed strangling him, but that he came too late to save him; and that Harris' plea was the deceased was in a fit, and he was only assisting him. Morgan further deposed that he instantly returned and made a feint as if going down stairs, but creeping up very softly to an adjoining room, he there, through a key hole, saw his master rifling the breeches of the deceased. Harris peremptorily denied every part of this story from the beginning



to the end; and the body having, by order of the magistrate, been inspected, and no mark of violence appearing thereon, Harris was nearly on the point of being discharged, when the maid servant desired also to be sworn. She deposed that almost directly after her master came down in the morning, as she must conceive, from the traveler's rooms she saw him going into the garden (being unknown to her master, in a back wash house which overlooked it), saw him take some gold out of his pocket, wrap it up in something, and bury it at the foot of a tree in a private corner of the place. Harris turned pale at the information! He would give no direct answer as to the circumstance of the money! A constable was dispatched with the girl, and the gold, to the amount of upward of £30, was found! The accused acknowledged to the hiding of the money, but he acknowledged it with so many hesitations and answered every question with such an unwillingness, such an apparent unopenness, that all doubts of his guilt were now done away, and the magistrate committed him for trial. Harris was brought to the bar at York, summer assizes, which happened about a week after his commitment, in 1642. Morgan deposed the same as when before the Justice. The maid servant and the constable deposed to the circumstances of the money; the first as to the prisoner's hiding and both as to the finding of it. And the magistrate gave testimony to the confusion and hesitation of Harris on the discovery, and being questioned about the hiding of the money. Harris in his defense, endeavored to invalidate the charge by assertions that the whole of Morgan's evidence was false; that the money which he buried was his own property, honestly come by, and buried there for better security; and that his behavior before the magistrate on this particular arose from shame of acknowledging his natural covetousness—not from any consciousness of guilt. The Judge then summed up the evidence, remarking strongly on the circumstances of the hiding of the money and the weakness of the prisoner's reason for his so hiding it and the jury, consulting together for two minutes, brought in their verdict of guilty.

Harris was hung. It was afterward proved that he was innocent. Morgan and the maid servant were lovers. They saw their master hide money in the garden and determined, when it had sufficiently accumulated, to take it, get married, and set up business for themselves. In the meantime, Harris fell out with Morgan, who determined to be revenged on him, and communicated the same to the maid servant. He took the occasion of Gray's dying in the house to perfect his revenge, by preferring the accusation. The maid servant discovered that the magistrate would discharge Harris, and her lover be held for perjury, and she therefore chose to sacrifice the hidden gold to strengthen the testimony of her lover with her own, and the conviction followed. It was, when too late, discovered that Gray died of fits, which he was subject to, and that he never had five pounds in his life.

*Mr. Dickson* said it was not questioned that circumstantial testimony sometimes lied, and lied so that no human agency could solve the mystery. There may be cases of innocent persons convicted by circumstantial evidence, and no legal talent or human agency have the power to establish their innocence.

This case is incomprehensible in all its connections. It was shrouded with mystery, and I do not profess to understand the case in all its bearings. All was inexplicable and all mysterious but perhaps some day may reveal all its transactions. He who went to the grave was anxious to make a disclosure, but was cut off at the very time when he desired to make known the circumstances.

*Mr. Dickson* said he would now come to the case in hand, and would read at the commencement, the statute upon the crimes act, calling the especial attention of the jury to the penalty of murder in the third degree, which says that if a man kill another without malice, while the slayer is in the commission of an unlawful act, he shall be imprisoned not more than ten nor less than one year.

The first proposition is that the man who did the act is not guilty of murder. The man who committed the act did not intend to murder, and therefore was not guilty of mur-

der. The man who committed the deed provided himself most carefully with witnesses against himself. There are two or three witnesses to every act, and could it be possible with all this, that he intended to commit murder? The man made no secret as to the manufacture of the box, nor exhibited any agitation. He went about it in a plain, open, business manner. He had no murder in his heart, from the fact that he made no effort to conceal the manufacturing of the box. He borrowed a screw driver, when he might have bought one for ten cents. Why commit such folly if there was malice in his heart? He surrounded himself with witnesses; mechanical witnesses; all kinds of witness. He exposed himself frequently. He was found by Mr. Hand in the carpenter shop, on the corner of Mound and George streets. He was in company at the door with an old man. He said, "There is no one in there." The man said, "Yes, there is, for the window is open." He went in. Would he have gone in there if he wanted it to be secret?

*Mr. Dickson* then referred to the attempt to purchase powder, and compared the discrepancies of the testimony on this point. Allison knew all about the box. Recollect the testimony of Meara upon the declaration of Allison, that Allison knew of the preparation of the box, and knew it would be sent to him, and who even did the deed was known to him. The box was handed to Allison joyfully by his wife; and, without thinking, he drew the lid. The iron in the box, the instrument that had caused such destruction, was not accounted for. Was it possible that, in such a large city, the torpedo could be made without somebody knowing it? So that if this view of the case is correct, the horrible crime charged by the Prosecuting Attorney has not been committed, and the fair fame of our city is not so deeply blackened. Whatever may have been the crime, the testimony does not fasten it conclusively upon the defendant.

The discrepancy in the statements of Hiveley, McCullough and Travis, the carpenter, as to the identification of the prisoner could not convict the man, for they disagreed, and there-

fore there were reasonable doubts that they were mistaken. Both Black and Wetherbee had sworn to picking up the card and handing it to Dr. Lawson. There must have been two cards in the room with the same direction, and there was no evidence elicited that the card now in court had ever been on the box that was supposed to contain the infernal machine.

Much time had been consumed in these matters, but they were of such importance that a close examination was necessary, and the time consumed pardonable; for how much alike are God's human creatures—how alike in their formation, construction and bearing, similarity of feature and expression may deceive the most expert. You, gentlemen of the jury, how often have even you been deceived in your remembrance of an acquaintance, even those whom you have known well—why, the books are full of such cases of startling interest. (Here *Mr. Dickson* read the case of the Commonwealth of Massachusetts against Hy. Sherman, for assault with intent—in *Western Law Journal*, volume 3, page 201, wherein the defendant was positively identified by several individuals; without collusion, and even articles of possession were with like certainty sworn to).

Now, gentlemen, do I insult your reason when I ask you not to place that implicit belief in this evidence of unpositive testimony of the identity of this defendant as the prosecution desire, when it is so much shaken in nearly every instance, and never with such certainty that you may, without doubt, rely upon it? And to fortify myself still further, I will read you a case which occurred in France, and recorded in Beck's *Medical Jurisprudence*, in which a husband left his wife, and during his absence, another man, answering his description, came into the neighborhood of the wife, so much like the husband in every particular that she received him as such, and actually lived with him without any knowledge of her error until the real husband's return. And still another case, recorded in a volume of "*Celebrated Trials*," where the innocent defendant looked so much like the real criminal as to firmly convince the woman, who swore to the fact that this

man was the identical one who had been in her employ and robbed her; and although almost a positive *alibi* was proven, the defendant was hung. Here we have not offered to prove an *alibi*, we have offered no testimony to such effect, and you may think it strange, but how would it be possible, in even yourselves, to prove to the conviction of a jury where you were at a given time a few weeks ago: how would you prove it? Who could recollect? even himself, without other testimony, would not be able to explain. Then say not to us, why not prove an *alibi*?

I now propose to pass to other portions of the case, and leave that of identity, without citing other of the many authorities. Because that this man left this city about this time is it so very singular? for was it not shown conclusively that, for some time it was his desire; for there was no object for him now to remain here—the summer course of lectures, the only incentive to remain, were postponed—he had only been kept back thus long from his inability to raise the money that was due him; but now his arrangements were completed, all who knew him were informed of the fact, he had published it frankly and honestly, as you or I would; and I therefore say it was not strange, but perfectly natural, and reconcilable with the most perfect innocence—aye, innocent man that he was—remember his desire to return, and so would have done had it not been for the earnest expostulation of that brother whose heart strings were wrapt up in love and yearning for him and his safety. And here, also, interposed the advice of Mr. French, his legal adviser, to whom, most naturally, the inquiry came, Can William Arrison return in safety to his person, and the certainty of a fair, impartial trial? This brother only desired him to wait until the storm of indignation had passed—until the dark and lowering clouds that hung like a pall upon him had given way to the light of reason, and then, without the certainty of ruthless violence, he might stand up in the majesty of his purity and proclaim, I am now ready to be judged by the laws of my country.

In the progress of the testimony what do we find next?

Why, introduced upon this stand, comes a man who is a perfect stranger to the whole of this people; a man from way down East—a professional expert—a man who prides himself that he has sworn in nearly every New England State in the last three months, and never failed to convict. Perhaps this man accidentally is here; but this I do know: it was only to produce an impression, for Mr. Pruden knows that the defendant never denied writing this letter; it was all got up for parade; to impress the jury; and he thus consumed the greater part of one-half day in introducing testimony in regard to a letter which we had no desire or cause to deny; and for nothing but effect. And, now, here is this terrible letter: The letter is perfectly reconcilable to the prisoner's situation, conscious of no guilt, and only a desire to know how to proceed to quickly and effectually establish innocence.

Oh, but he changed his name! But remember that George Thompson changed his name to Isaac Allison. Every postmaster, from the little ones clear up to big Dr. Vattier, were sticking their fingers into any and every letter that had the name of Arrison upon it—and how necessary it was for him to hear from this point to know whether it would be prudent to return? What could he think of his safety with Cincinnatians? and how well was he sustained in his opinion as exemplified by the conduct of the Deputy Marshal, while this man was under arrest in the clutches of three strong men, to exclaim to him: "Your heart is as black as your coat!" is it wonderful to suppose that justice could be got where such officers are the representatives of the people? It is not singular at all for persons to change their name. It has been often done as a matter of convenience, where no criminal object was known. The person had had perhaps, some little difficulty, and was trembling with fear that some prosecuting attorney would make a mountain out of a mole hill.

The commission of a crime of this magnitude must have had a clear, unmistakable motive; and what is the motive alleged by the prosecution? Nothing but a trifling fight which had occurred six weeks before and had since been made up—

a squabble resulting from a little ill-feeling in regard to some cups and a book. And is this the motive to invent a horrible instrument such as this? But threats, it is said, were made showing malice. If a man was contemplating a deed like this, would he not keep his mouth shut? The very evidence of threats conveys the very certainty that he never contemplated an act of this kind. But it would be well to see how and where these threats were made. It is when he returns the pistol which he borrowed from Blackburn to shoot a dog. Blackburn asks him how he has settled his matter with Allison, and very valiantly volunteers what he would do under such circumstances. Arrison must not appear as wanting courage, (and I very much suspect that brother Blackburn and he would run before they'd fight) says, "Oh, I'll be even with him yet."

Allison's and Mrs. Allison's dying declarations were that Connolly did the deed; their minds never turned to Arrison; he was never thought of while these two lived; the two who could have exculpated Arrison. It was never breathed of this man's guilt until the only two who could, and no doubt would have exculpated him, had gone down into the grave, where forever they must remain. Where does the suspicion first arise to fix this matter on this defendant? From Dr. Baker's daughter: learned, no doubt, from her father on the night of the explosion. Why did not Dr. Baker, if his suspicions were then directed against this man, why did he not go to the dying man and woman and have those suspicions confirmed or forever hushed? They could have told the tale; they would have done so. Steeped in guilt as Allison might have been, he would never have plunged in the presence of his God without saying that word, if asked, whether Arrison was the guilty one. I would not attempt to blacken the character of the poor unfortunates who have gone to their final account; but my respect for the dead must not let me forget my duty to the living.

But the dying man, with all the full responsibility of his situation, uttered, in his anguish: "This is the fruit of an



iniquitous life." I base my theory from the declarations of the dying man when he was going before his God—in that last moment of expiring nature when all inducements to hide his guilt were removed.

The getting up of such a machine as this is represented to have been is the act of dark and wicked minds, and Allison's knowledge of it came home to him in his dying hour, and his thoughts turned inward on his soul, where nought was but guilt! guilt!! guilt!!! It is for men of dark and bloody deeds to do such as this; not for such as this young man, whose character is beyond suspicion. He was one of Ohio's boys, whose father won an illustrious name as an officer, in the times of our country's need, under the brave chivalrous Scott. This sire gave to the world sons inheriting his virtues, one of whom, bathed in his own blood, fought for his country's honor in every field in Mexico, save one; twice wounded on the ensanguined field of Monterey—the other, this defendant, in peaceful pursuits, seeking for happiness in a rural life, until California opened to him a prospect to accumulate the little means to pursue a course of study to fit him for a professional life. We find him at the Mission Institute at Quincy, Ill., an attentive student in 1849, from whence come voluntarily such testimonials of character from the most honorable men of Illinois that any young man within the hearing of my voice might be proud of, and when we find him here in our midst at the Marine Hospital, in one short year before he had graduated, the confidence of Dr. Baker was so well established that he was made house surgeon. Why should you labor through a lifetime establishing such a character if it is not to aid you in this hour of darkness, if it is not to be an heirloom to pass down to your children's children?

Gentlemen, I will now leave the case with you to bring home to your honest convictions when you have retired to your rooms. I thank you for your attention.

*Mr. Johnson* stated to the Court that, in consequence of his feeble health, and the excitement he had undergone through the lengthy



trial, he was unable to argue the case then, and requested that the Court would adjourn over until Monday morning.

JUDGE FLINN said that circumstances compelled him to urge the continuance of the case during the business hours of the day and he believed going on with the case without delay would contribute more to the perfection of the objects of the trial. He would, however, adjourn when the gentleman felt himself unable to proceed.

MR. JOHNSON FOR THE DEFENSE.

*Mr. Johnson* said that he was embarrassed with the case. He had practiced law upward of twenty years in one position or another; had practiced in criminal courts as well as courts of common law, but this was the first occasion that a man had ever done him the honor to place his life in his hands, and he felt the great responsibility resting upon him, in what he conceived to be the discharge of his duty. I come, then, in the spirit of inductive philosophy to ascertain what are the facts, what are the circumstances and what are the laws of human action that govern men in the laws of life. The jury is bound to ascertain that the guilt of the prisoner was so conclusive as to exclude every other hypothesis of the transaction. There is no secret in my bosom in relation to this case which if transferred to you, gentlemen of the jury, would enable you to form any opinion. I have hypotheses and opinions of the case, and that is all. As to Chief Justice Gibson's opinion on evidence, although I was well acquainted with the man, and was born in the same state, he was a man who had no bowels, and who consumed brandy and human life equally without remorse.

He called attention to the variety of the witnesses, seventy-four in number, and said it gave him pleasure to believe that not more than two, or probably but one, meant to misrepresent the case. No witness testified to the truth exactly; and the law was so universal that lawyers deemed it a circumstance to doubt the credibility of witnesses when all testified precisely alike. Dr. Baker testified that he had read one-third of the newspaper reports of the explosion, but was unprepared in his own mind to state, when questions were asked him on the stand, as to the declaration of Allison, from the

impressions on his mind as to whether they came from Allison or his wife, from other persons in the room, or from the newspapers.

The public mind had been in the greatest state of excitement about the death of the Allisons, and although he had witnessed the funeral ceremonies in this city of three Presidents of the Union, he had not heard of or witnessed the pomp and circumstance of the funeral of the Allisons. The City Council had offered a reward of \$500 for the arrest of the perpetrator of the murder, and immediately all the *quid nuncs* started to hunt and see if they can find whom they may, and to try some one and convict him. There are a class of men always on the alert for this business, and they had about as much principle and as much moral sense as the Flathead Indians. They were busybodies, always prying into other persons' business. There was another class of witnesses always playing second fiddle to thief catchers. There were men whose ignorance led them, when listening to a stutterer read, to imagine that he out-read Garrick on Shakespeare, and out-Mansfield Lord Mansfield himself. Put \$500 reward before such a man and is it reasonable that he could testify without contradicting himself? There was a class of jackals who smelt the game for the lion, and after that noble beast had partaken of the feast, was content to prey upon the bones.

As to Captain Hoke's testimony, with all due respect to the head and heart of the witness, he was mistaken in his statements. Gould, the high priest of Yankee experts, had testified to the similarity of the writing of the letter, had testified in cases before, and never failed to hang or convict his man.

The groove in which the minds of policemen run is conviction. It is their business, and when they are brought on the stand, although reluctantly and against their will, they desire to convict. Although Marshal Ruffin does not like me, I have the kindest feeling for him. He has been Marshal of the city for many years, and from circumstances and his position the tendency of his mind is for conviction. Yet he is an honest man and does his duty well. He testified that he did not find

a solitary mark on the defendant by which he would have recognized him save the hair growing between the eye-brows which he said was there when the prisoner was in the watch house, but which he intimated had now been removed. I questioned the prisoner, as he valued his life about it, and he submitted to the microscopic examination. Dr. Wood's examination settled the question as to Mr. Ruffn's statement. He made the examination with a microscope that magnifies an inch one hundred times, and stated that no hair had been shaved off, none plucked out, and no chemicals used. There is another class of witnesses who go about saying: What will you give if I catch so and so? Judas Iscariot, Esq., was the first of these, he belonged to the detective police and sold his master for thirty pieces of silver; but, thank God, he was not mean enough to testify against him.

There are some who had an indirect connection (the carpenters, Mr. Robinson, Dr. Baker and others) with the explosion, and in giving their testimony they must have felt a deep interest in the case, and an earnest solicitude that the crime should be settled definitely on some one. This class of testimony should be construed with reference to the character, vocation, motive and feelings of the men.

*Mr. Johnson* asked that the Court would adjourn; he said he was feeble and unable to proceed. He thought by adjourning over he could gain time and condense his argument.

THE COURT said that the usual business hour (six) for adjourning had not yet arrived. It hoped counsel would finish the historic part of the case.

*Mr. Johnson.* I am not a speaker of that kind; I am rather demonstrative. With permission of the Court I will take a chair, sit down and address the jury. I have been here six days with my feet on the stone floor; am worn out, and would be murdering my client if I was compelled to go on and argue the case.

THE COURT. If such is the case we will adjourn.

*Mr. Johnson.* Before adjourning, I desire to say that I am glad to notice that there has been no undue excitement in the public mind with regard to the case, and no undue course pursued by the press since the trial commenced.

THE COURT. Owing to the importance of the case, and that the Jury might have no communication with others it is my duty to order them in custody of the Sheriff until Monday morning.

December 18.<sup>18</sup>

*Mr. Johnson* asked the jury to give him their undivided attention. He did not expect to be very brief or very interesting. What is all this assemblage for? You see the space behind the bench crowded with ladies, and the outside of the bar bowldered with human heads. What is this for? The people are following out the ordinary course of human nature. If the case was one of positive evidence, where the body of the crime was proved by positive facts and evidence, if the act was done in self defense, or not premeditated, there would be hardly a dozen persons present. But it is the strange, wild, and curious romance of the case that attracts. The people love more to dwell upon the marvelous, than the serious laws of human nature. The mind loves to tread the mazes of mystery, and it is natural enough that mystery appear in this case, and the people should come to see, if possible, how the ingenuity of man, can extricate human life from the mystery that it is surrounded by the circumstances.

By the time I chase away the phantoms of the case, you, gentlemen of the jury, will see how it stands. Let us look at some of these circumstances light as air, that are termed circumstances. The remains of a pistol is brought in here, in perfect working condition with all its movements in order and supposed to have been exploded in the box that caused such devastation and destruction in the room. Capt. Hoke brings it in here as a thing handed to him by a Dutchman; Capt. Hoke knows nothing about where the Dutchman found it. Does that connect the pistol with the case? Where the Dutchman got it no one knows. The witness does not know

<sup>18</sup> This morning the court room was crowded to its utmost capacity. Raised platforms were erected outside of the bar, and inside, seats had been prepared for members of the bar and others entitled to the privilege of a place within the bar. Some thirty or forty ladies were in attendance, most of whom occupied the space behind the judge's bench, and even excluded the judge himself from his usual seat, compelling him to stand up a large portion of the time during the delivery of the argument.

where it was found, and the man who handed it to him is not here. If there was anything in the box to which it might have been attached, that would be some pretense on the part of the prosecution. There is no evidence that it had anything to do with the machine, and has no more to do with the case than my great grandfather's shoe buckles.

Another shadow. It seems that the defendant went to Ad-derly's drug store. I don't care to argue the question of identity, I don't know if he did go there, and I don't care if he did. He went there on Friday and inquired if they had gunpowder. He was amused and laughed at the blunder he made in mistaking the sign of "Blue Lick and Soda Water" for "Licensed to Sell Gunpowder." Would a man having malice and murder in his heart jest about a mistake? He then inquired for twine, and got some with the strands red and white, or blue and white. What has that to do with the case? The twine has not been brought into court, and the witnesses swear positively that the box was wrapped in white cord. He asked for gunpowder! A man who was born in the woods, who had moved from wilderness to wilderness, was about going to a country where gunpowder was both scarce and bad. Every man going to the backwoods is in the habit of providing himself with gunpowder. It is the most natural thing in the world that he should thus provide himself. Upon such circumstances the case is made; and would you, gentlemen of the jury, put that man to death because he inquired for gunpowder, and procured a little bit of twine, which if used at all, was never used on this machine? Again; Salisbury kept gunpowder, and defendant had free access to the store, frequently going behind the counter to write letters. Yet the bare fact that the defendant might have stolen some gunpowder is made a circumstance in the case. Are you to impregnate your imaginations with a whim that my client stole the gunpowder in order to complete this machine? Such is a circumstance in the case.

It is true that he left his boarding house on Saturday evening and went somewhere else until Monday night. Is there

anything strange that he should make such a change? Is there anything strange, that while the water was so low, and he was desirous of getting home, he should change his baggage to where he could watch for a boat? He was walking about the city from Saturday night till Monday night, going from house to house bidding friends goodbye, shaking hands with persons in the street, and telling all that he was going to a place where he did go. What is there in that circumstance that might not befall you or me or everybody in the community? Yet this is a circumstance that this man is to be found guilty and hung.

Another circumstance is, it seems that he paid a visit in the country a short time before to a Mr. Cooper, and he (Cooper) after defendant went to bed, heard him walking the room during the night, and went to see the prisoner about it. This is regarded by the prosecutor as a damning circumstance. I ask you, gentlemen of the jury, whether you have always been able to sleep from dark till day. Have you not had an ungrateful child, a false friend, or some overwhelming misfortune to make you pass a night of restlessness? "The oppressors wrong, the proud man's contumely, the pangs of despised love, the insolence of office, the law's delay, the spurns that patient merit of the unworthy take." Have none of you been afflicted; have you always been able to lie down and close your eyes till morning? All of you, at some time or other, have been disturbed in your repose. It is not the murderer alone that walks his chamber while others sleep. The penitent sinner with his heart communing with his God—the lover discarded—the merchant on the verge of bankruptcy—the student solving some philosophical problem—all walk their laborious chambers at night. Every man is prone to such with reference to his peculiar vocation in life. The pious member of church, the student, the banker and the merchant would all assign their reasons for his waking hours; but the police officers are the men who construe them into evidence of theft, murder, or some great crime. Bring me here, the farmer's son, who has farmed almost his entire life; gone to school and exhausted his means, and then trod the sandy deserts of the

West to seek means for the completion of his education—worked in the mines of California to attain this—returned home and have it all swept away by one unfortunate speculation with such men as Dr. Baker. The man can give you a reason for not sleeping soundly. Was not this the reason, that he had no money nor could not borrow it, that he assigned to Mr. Cooper for his restlessness? Yet this is so potent as to be impressed on you as a circumstance in this matter. It is an outrageous mockery to urge such a circumstance in the case. You must have something more reliable than shadows of this kind before you make up your minds as to the defendant's guilt.

I will now proceed to the substance of the case which is limited: First, the quarrel, which is worthy of your consideration; second, the cards; third, the box, and fourth, the flight and concealment.

The quarrel as showing the motive, the card as one of the initia of the case, the box as the means, and the mystery of its introduction, and the flight and concealment, are alone worthy of your careful consideration, and nothing else. The other five circumstances I mentioned have nothing to do with the case. They might have multiplied *ad infinitum*. There might have been a circumstance that the defendant might have stolen a piece of gas pipe. If you conceive a leading idea, you can multiply thousands of circumstances upon it. I have attended performances of ventriloquism, and once when hearing one I practiced myself so that I could surpass the original. It is simply a trick in calling the attention of your audience to the spot from where the imagination expects the voice to come from, not from where it actually proceeds. It is the effect alone of imagination. So it is with circumstances; if you once conceive a leading idea every other circumstance may be brought to bear on that point. This is the reason that such species of evidence is so uncertain.

I will now refer to the character of the defendant. In olden times the rule of law was to prove a character in doubtful cases; but the law has progressed, and its whole progress has



consisted in its approximation to common sense. The law now is, that the defendant's good character is proper to be given at all times. The defendant's good character is proper to be taken into consideration always, not that he should not be punished if convicted. When we come to inquire, "Guilty or not guilty," it is proper to know what the character is, and inquire if such a man could be guilty of such a deed. A notorious loafer, too lazy to work, too proud to steal, without occupation or means, you would think guilty of a crime before you would a moral man, of good character and with means.

I will read the certificate from seventeen persons residing at Quincy, Illinois, testifying as to the prisoner's former good character, which we have before published. There is other testimony nearer home to the same effect. The defendant has proved as good a character as you, gentlemen of the jury, or as the Judge on the bench, or Mr. Pruden, or Mr. O'Connor. Not one of us can prove a better one. Gentlemen, most or all of you are fathers, and have felt the responsibilities of that relation. You are here today, involved in political contests; next day you are immersed in business; but there is one place alone where a man feels and knows, pre-eminently, that he is a man. It is when he sits enthroned on his own domestic hearthstone, the prophet, the priest, and the king of his own domestic household. Here each of you sit to give law to your sons and teach them the road to virtue, to happiness, to respectability. And often you say to your son: "My son, look well to your character; for that may be your ultimate reliance in this world. You may be reduced to poverty, but a good character will be worth more to you than wealth. You may be friendless, but a good character will raise you up friends where you least expected them. You may be maligned and vilified by a mercenary press, but men of unstained virtue and high moral worth will step forward to give the lie to all scandal, written or unwritten. Clouds and darkness may shut you in on every side, so as to leave you without a ray of hope, but a good character will have but to await the first ray of truth that



may burst upon it, to shine more effulgent than ever." Take heed that, while you speak, your little son, with a sense of bitter mockery working in his features and beaming in his eye, does not reply: "Father, did not you sit on the jury that tried William Arrison? Did not honest men, and good men, and wise men, tell you of his good conduct from childhood up to the day of his misfortune? Did not he prove as good a character as ever I can hope to achieve; and, after all, you flung away both the man and his good name on the most dangerous of all evidence." Take heed, I say, that the parental scepter be not thus broken in your hand, and that in your overweening zeal to punish human frailty, you do not endanger or destroy that which is worth more to society than the punishment of a thousand criminals.

There are circumstances here which, I admit, tend to blacken the character of the defendant. I admit it frankly, I may be called an old humbug by the Prosecutor, but I am candid enough, and honest enough to admit that there are circumstances here that blacken my client's character. But, O God! what a web of strange, mysterious wonders surround the case. When that man's brave old father fought at Lundy's Lane, and wept at the triumph of the star-spangled banner of his country, could he have looked down through the vista of the future and see his son sitting here a criminal, what would be his feelings? Can you, gentlemen, look thirty years hence and imagine, for a moment, your feelings, if you had convicted an innocent man? I admit the fight in its fullest extent. I admit my client being beaten and foiled by Allison; nay, I admit that he had reason to think he had been wronged, and his heart most likely to corrode. The deceased knocked down the defendant, and if Arrison had had a pistol then he would probably have taken his life. There is a growing sentiment in this community that a man may submit to being beaten once, but if attacked again he has a right to take the life of his assailant. As to the right of this I have nothing to say. I think if deceased had attacked Arrison again, and when he had the pistol in his pocket, he would have shot him; but he returned the

pistol, and said in conversation about deceased and Dr. Baker that he would be even with him.

The witness thought that it was very likely the expression might be applicable to Dr. Baker. That previous threats are proper evidence I'll not deny; previous threats are proper and potent to establish the existence, the *quo animo* and intent when the crime is committed. But previous threats are feeble to prove the body of the crime. It will be said that, knowing the man had ill-will, it is more likely that he did the deed.

I will here read you the following case arising from previous threats, printed in the September number (1854) of Harper's magazine:

"About fifty years since, a man was brought to trial for the murder of a fellow laborer. The evidence against him was very strong. They had been digging together in the field where the murder took place. The victim was found lying dead upon the ground; the fatal wound was inflicted by the stroke of a spade, which was found beside him; the edge covered with hair and blood. His companion was not in the field but his was the spade which had given the death blow—it was marked with his name. In further evidence it came out that they had had a violent dispute the night before about the division of the sum to be paid for the digging of the field. To the surprise of every one who attended the trial, the jury could not agree; there was one who refused to join in a verdict of guilty. After having held out for the allotted time, they were taken to the usual confines, and there dismissed. The man was liberated; but though he had escaped with life, he was looked on as a murderer. It was not for many years after that that his character was cleared. The person who had put the poor man to death was a sporting gentleman, who had gone out hunting early in the morning. Some of the hounds had bounded over the hedge and the gentleman followed them. One man was in the field alone, the other having gone to light his pipe at the nearest cabin. He spoke insolently to the gentleman as he came forward, to order him out of the field. The gentleman made a slash at him with his whip, and the man, hurrying aside to avoid it, slipped and fell on the edge of the spade which was in the ground; his head was cloven, and he laid dead upon the ground. The gentleman, in agony, went to a friend and told what had happened. Acting on his advice, he immediately took ship and went abroad. On finding shortly after that the poor man was arraigned for the murder, the friend of the gentleman managed to have his name on the panel, for the purpose of saving the man—he was the juror who refused to affix his name to the verdict of guilty."

In the case of Arrison the fight occurred a month before the disaster. The defendant had time to reflect; and with the

evidences we have of his previous good character, there is good reason to believe that he could not or did not retain malice for so long a period.

In Phillips on Evidence (page 71) there is a case of a man being found dead in his room; a pistol was found near him, and it was supposed he committed suicide. This was in Germany, and where no one is put to death without first confessing the crime. It appeared on examination, however, that the ball that lodged in the man's head was too large for the pistol, and could not have been fired from it. It was clear, then, that the man had been murdered. A girl, a niece of the deceased, brought up by him, and to whom he intended to leave his effects, was receiving the addresses of a man whom her uncle did not approve of. He threatened to alter his will. She was often heard to wish her uncle dead, and from these circumstances she was arrested, thrown into prison, and put to the torture in order to force a confession. She persisted in her innocence, and was afterwards released. She escaped with life, but was bodily injured and crippled. Her innocence was afterward made manifest by the dying declaration of the actual murderer.

It would make your hearts ache, gentlemen of the jury, if you consign that man to the gallows and William Connolly, of New York, some years after, confess that he murdered Allison. There is another case in the same book (page 9), Mr. Shaw, an upholsterer of Edinburg, in 1721, had a daughter Catherine, who encouraged the addresses of John Law, a jeweler. The father opposed the marriage, and forbid Law the house. In an interview with her father she was heard to say, "I'll never marry Robinson, the one you desire me to, I would rather die." She was locked up. Groans were heard coming from her room, and she was heard to utter the words, "cruel father." The neighborhood was alarmed, and when the door was broken open, Catherine was found lying on the floor dying, with a knife sticking in her side. When asked if her father did it, the nod of her head answered apparently in the affirmative. Mr. Shaw was found guilty, hanged and

quartered. Notwithstanding the protestation of the father under the gallows all Edinburg believed him guilty. A note was subsequently found, written by the daughter, addressed to her father, stating her determination to take her own life.

Proof of a previous quarrel is not so much introduced to prove the body of the crime as the motive of malice. The quarrel of the deceased with the defendant was about one month before the death of Allison. After the beating, defendant returned the pistol and said to Blackburn, "It is all foolishness." The fact that afterward they were both on duty at the hospital, and must have been on speaking terms, the deceased as steward, and the defendant as surgeon, is a stronger circumstance of a reconciliation than the guilt of the prisoner. No one saw them reconciled, but the fact that they were together is stronger proof of a reconciliation than it is of the guilt of the defendant. The dying man's declarations, cut off as he was, and sent to his account before his time with all his sins upon his head, are sufficient evidence of that. He said he owed no man ill-will, save one, and that was William Connolly of New York. I repeat that the difficulty had been settled between the deceased and the defendant, and there is no earthly reason that William Arrison should construct that machine and take the life of Allison. I have had sharper words with Mr. Pruden. I have seen Mr. Pruden strike a man a blow in open court, and yet a man does Mr. Pruden a great wrong when he says that he harbored malice in his heart an hour afterward. You are to try the case, gentlemen of the jury, according to the laws of human action and to consider if they acted as men ordinarily do. I appeal to your knowledge of the human heart, and say that you are to judge by the outward acts. When the public mind is great on any subject, especially murder, the tendency is to sharpen the mind so as to sustain belief. That is the true statement of the laws of human conceit. When any one is accused of a particular crime, especially one like this—when the public mind is greatly excited on any subject, such as an atrocious murder, and the arrest of the accused, the universal tendency of the mind

is to shape and modify circumstances of no importance so as to sustain belief.

Let a banker take in deposits and run away, how rapidly the mind runs back to see if we cannot recollect some circumstance where we foresaw the result. The mind first looks to the future, and next after a thing is fulfilled, to believe that we saw circumstances that foretold. Let the idea be started that a female has stooped to folly, how many devils come out of hell to prove that, by some circumstance, they foretold it. Pious pride tells you that it has seen mysterious oglings between the fallen one and her paramour at church, the servant girl swears she has seen wonders through the key hole; every imagination is taken to make out the case to which public mind has been attracted. Joan of Arc, after achieving such unheard of exploits, was charged with being a witch, and burned at the stake. Circumstances that surrounded her grew blacker and blacker, until one person swore they had seen her conversing with the devil. Downward, downward, is the effect of circumstances; and falsehood is made to appear true by circumstance, like the old woman who swore positively that she saw the cow eat the grindstone.

The great masses are unable to get rid of first conceiving a hypothesis, and then seeking after circumstances to sustain that hypothesis. The more ingenious the mind is, the more it wanders to overreach itself. Men of ingenious minds finding a story incomplete, are ever prone to search their imaginations for some link to supply the defect. The tendency of the human imagination is to connect circumstances to a central point. We cannot deny ourselves the gratification of finishing that which seems to be incomplete.

There were father confessors in every community besides churchmen—such men as your Hokes, your Ruffins, your Hardings, and even George Hand—always trying to fish out, by some hook or crook, something or other in the shape of confession—seeking to have it published in the report. Such a man as George could say to his children. “I was the man who discovered the William Arrison that killed Allison.” You

see the danger of relying on the statements made by the discoverers of guilt. There are men who go up and down, like Dogberry, with deceit like Judas Iscariot—like blood-hounds—in order that it may be said they have made the great discovery of a murderer.

There is another case in Phillips on Evidence (page 81, of an execution on circumstantial testimony, which afterward proved to be fatal error. The proof of guilt comes providentially, but the proof of innocence just happens. It is always dangerous to convict a man of murder on circumstantial evidence alone. I don't say it is wrong, nor that a case cannot be made out on such evidence, but I say it is dangerous. First the circumstances themselves may be false, and second, even should they be true, the inferences drawn from them are liable to be false. There is a reported case of an old man and a young man retiring to a room which was locked. In the morning the room was found empty and the bed covered with blood—traces of blood were found to the river. The young man was arrested, and on his person was found the knife and a piece of money known to have belonged to the old man. He was convicted of the murder but afterwards broke jail. It turned out afterward that the young man had gotten up in the night, and the old man told him to take his knife out of his pocket and open the door through an open secret spring. The coin was sticking in the handle of the knife. The old man shortly afterward lost a bandage off his arm, which had been bled the day previous; got up and proceeded to his surgeon on the river bank to have it redressed; but going along the quay was seized by a press gang and impressed in the navy. All the circumstances in this case, lied; nothing ever does lie like circumstances.

I have already stated that the conviction of this man is sought to be accomplished by circumstantial evidence alone. Now, the chances against such evidence are double; first, the circumstances themselves might be false, and secondly, the inferences are liable to be false. Circumstances develop only secondary sort of facts, and this case rests wholly upon this

secondary circumstantial evidence. It is well known that circumstances do lie egregiously sometimes, and it is in such cases that the ingenuity of man is exerted to make them supply the place of facts; and, perhaps, under exciting influence, well-meaning persons are carried away. The evidence of ninety-nine persons out of one hundred, might be truthful, but that of the one-hundredth might lie, and an innocent person, from the connecting link furnished by this element of perjury, might be hung.

There is another case in the September number of Harper's Magazine, in the city of Dublin to prove the fallibility of circumstantial evidence. A woman who served families with milk had for a customer an eminent surgeon, of good repute and excellent character. Going to his house on her usual errand one afternoon, she found the street door ajar, and walked into the kitchen, where her shrieks soon attracted a large crowd of passersby, who beheld, lying upon the floor, the servant girl, weltering in her blood, and by her side a surgical instrument which a medical gentleman standing by pronounced as having inflicted the fatal blow. In a coal hole close by was found the shirt of the surgeon, with his initials on it; and, as the instrument was proved to have been his, he was arrested, tried, found guilty and hanged. He to the last, however, protested his innocence. A few years afterward, one who had emigrated to America returned, and then disclosed, in confession to a priest, that he had been the sweetheart of the girl, and that upon the afternoon of the supposed murder he had called to see her. She was cleaning the instruments and he having in a playful manner demanded a kiss, she defied him to take it; when in the struggle she fell, and the instrument entered her heart. Horrified, he seized the shirt which she had in her lap and attempted to staunch the blood; but, finding that she was dead, he threw it into a coal hole, and then, fearful that if discovered he would not be able to prove his innocence, he hid himself until the crowd came in, then escaped from the house, went on board of a ship that afternoon and sailed to America. One of the witnesses against



the unfortunate surgeon was an old lady, who appeared to have nothing to do save to watch his house; and she swore positively that no person but the surgeon had passed in and out prior to the milk woman, but that she had observed the surgeon during the afternoon open the window, and, after looking in an agitated manner up and down the street, shut it again. There the great central fact is established, first, by the death of the girl by violence, apparently; and the circumstances, otherwise not at all unusual or unnatural, are forced and blended in to strengthen that fact, and the certainty of the guilt of the accused. Now, this was a case in which not a falsehood had been stated, except such as had emanated in the excited imagination of the old lady. Tell me no more that circumstances cannot lie. Did not that bloody shirt lie? Did not the wound, and all that went to take the life of an innocent man, lie? and yet at the time that evidence was thought as clear as day, and yet the circumstances lied.

I stated this morning that I would strip this case of the mere shadow that hung around it, such as the twine, the powder, the mysterious card, the box, and the flight of the defendant. Now, there are some facts in this case which are to be clearly and candidly admitted; I won't sacrifice my reputation for candor by attempting to deny them. We all know that Allison is dead, and that he died from the explosion of a torpedo is also beyond controversy; but there is no proof that the torpedo was in that box which is produced. Now, young Dr. Baker, Dr. Cummings, young Jackson, and the two boys, speak as confidently of this box as if it were the only box in Hamilton County, and yet, if you reflect, you will perceive that there is no positive evidence to prove that this is the box. Neither the boys who carried it, nor the doctors, nor the boy who received it, saw it. It was wrapped up in a brown paper package, but whether that package consisted of books or a box no one can tell, for no one saw it. I know that there is something sought to be made out of the weight of the box. Now, I don't doubt but that the torpedo was conveyed in a box, yet how many other boxes might have been in that room



no one knows: and although there can be but little doubt but the machine was conveyed in a box, still there is no actual evidence that this was a box. Now, it cannot be but that Mr. and Mrs. Allison had several boxes in their room, but these peculiar fragments were alone collected to prove this to be the box. Other cards, too, as well as papers, were neglected and thrown away; all, in fact, but that one, which was intended to make out this case. The police officers were put upon the scent, and we all know that it is their business to convict, not acquit; and while all these circumstantial fragments were being collected, the defendant went home to Iowa and concealed himself, leaving no friend behind him to defend him or look after his interests. Six months rolled away, and all the fragments of other boxes or papers, with the exception of those necessary, according to the judgment of the prosecution, have been destroyed or lost.

Gentlemen of the jury, I have said that circumstantial evidence can amount to nothing unless it is connected; it is essential that they should be linked together, and failing in this, no case can be made out. Now there is no evidence whereby Arrison is connected with this box; for I say that this box is not identified. There was no hole or cranny in the paper in which it was enveloped to peep into. Some of the witnesses thought they heard sand rattling inside, which you, gentlemen of the jury, are to take as being gunpowder; but Dr. Baker, who shook it going upstairs, stated that what sounded like sand must have been the rustling of brown paper. Mr. Pruden thought that it must have weighed no more than four pounds, and was not actually heavier than two or three good-sized books; so that nothing can be predicated from the weight.

Now, as regards the card, all that is sworn is, that it looks like the one on the package, and there are at least forty thousand cards in Cincinnati that look like it. This one was picked up after it had been trod over by countless inquisitive persons for the space of two or three days, and the witness who picked it up was so drunk while giving his testimony that I hardly know what he did say. I have had intense curiosity

about this card. To me it appears like a merchant's card, with a hole perforated in it for the purpose of attaching it to some merchandise; and if a torpedo were to blow my house into fragments tonight, any curious man could find twenty such. It might have been attached to a parcel containing books, or coffee, or bacon. Such have been sent me by young lawyers often five hundred miles distant. Now you might as well undertake to swear to a ten-penny nail, or a dime, as to a card. This one is the exact size of all ordinary cards. Witnesses attempted to identify it because it has an address upon it; so have most cards. I have had an intense curiosity to decipher the print on it, and it is a little singular that gentlemen who rely so much upon Providential circumstances cannot account for its being obliterated. It might have been sent on a package containing books, or a dress pattern, sent as a present by some retired student to Mrs. Allison, or it might have been sent by a lawyer, but in that case I must acknowledge I would not know what to think of it, but as it is, the history of the card is a profound mystery. Gentlemen, one of two things is true, either somebody punched the hole since the card has been found for the purpose of making it correspond with the testimony of Dr. Cumming's recollection, or Dr. Cummings, having seen it since, got it into his head that it was placed on; so he testified; but did he know? He did not handle it. It was Dr. Baker who carried it, and he testified to the rattling of sand or brown paper. Neither would Dr. Cummings be so likely to remember, as young Jackson, who testified that he slipped the card from the package and then placed it back again, and if he did so, then this was not the card: but allow it to be the card marked by Mr. Robinson, and I believe it is, although the evidence is not so reliable as if the writings was more legible, but even then does that make it the card that was on the box, and if this fact is not proven beyond a doubt, then there is an end of the defendant with the transaction. But I will return again to the box. Your minds are satisfied, and so is mine, as to the manufacture of this box, and that shows the difference between the positive proof and cir-

cumstantial evidence, but there is no proof connecting this box with the torpedo. The tube is of wrought iron, filled with gunpowder, and when exploded the consequences were terrible. It shattered the walls and ceiling, threw down a partition, blew the windows into the street, bursted out the panels of the doors, and is it probable that all this could have been done without marring one single board of the box. Why, if that box had been made of boiler iron, every plate of it would have been driven into the walls and shattered, but my client was unfortunately in Iowa, and he had no friend to pick up the splinters of what might have been the real box, which, in my opinion, was probably sent out of the windows, and scattered in a thousand fragments.

Had there been only one of the boards whole, it might have been set down as a Providential interference, but that all of the boards, save one, should be uninjured is utterly preposterous. Gentlemen of the jury, it is unreasonable to suppose that this is the box; how many boxes there were I don't know, but, gentlemen, either this is not the true torpedo box, or the torpedo was lifted out before it exploded; and if so, this starts a new theory, and that is, that Allison knew, or ought to have known more of the box by the mysterious third person who Mrs. Allison had no doubt was the author of the scheme and sent it. The only part damaged in the box is the top, and it is simply split; these, too, were trampled on for two or three days, and it is singular that by that alone, they were not damaged more, but the idea of the torpedo having exploded within this box is too preposterous to admit of argument. I say decidedly that this is not the torpedo box, and if it is, the torpedo was taken out of it before it exploded. Had I been present during the investigation, and when the box was found, I should have suggested the impossibility of its being the box on account of its perfect state; and then I suppose that Marshal Ruffin would have hunted out some other box.

As to the old pistol that was handed to Captain Hoke by some Dutchman, now gone down the river, I have only to remark that there was no loop nail, or in fact anything, to bring about this explosion. The black color of the interior

of the box I do not pretend or deem it necessary to account for; but were I to admit that William Arrison procured this card and box, the identity of this man's guilt would then be a question for the jury to decide.

I now wish to speak a few words upon the subject of flight, which is referred to as a crowning evidence of his guilt, inasmuch as he left this city and concealed himself in Iowa. But he did not flee from the city. Before leaving, he went about, shook hands with his friends, and told everybody where he was going. When did the secrecy commence? Somewhere in St. Louis, and as Mr. Pruden will tell you, from guilt; but I say from motives of fear. He lay sick a week or two in that city, and then found that a Coroner's Jury had founded a charge of murder against him; that a reward of \$500 had been offered for him, and that the bloodhounds were on his track; but that he meant to return and stand his trial is in evidence. There is not one word more in that document than Mr. French has testified upon the subject. He wished to know when it would be safe for him to return without becoming the victim of mob violence. If he could have a fair trial, and if he could pass through the streets without being lynched, he wanted to come with his brother, but was advised to wait. He was anxious, too, to know about the hard earnings which he had loaned Dr. Baker. He began to think that Mr. French had either pocketed the money or neglected his business. But his purpose was, after the excitement had passed, to face a jury and have an honorable acquittal. Is it always a sign of guilt that people secrete themselves when the bloodhounds are on their track? The greatest scoundrel in the United States was Dr. Gardiner, who cheated the government out of \$500,000, and got safe to Europe; but when he found that a bill of indictment had been found against him he came back and deposited the money to the credit of the United States and then challenged an investigation, and at last furnished the most conclusive proof of his guilt by committing suicide. There is nothing strange in innocent people assuming new names, and hiding themselves when fleeing from danger.

You cannot predicate anything from his hiding. He had read the verdict of the Coroner's Jury, he had seen that there was \$500 reward offered for his apprehension, and he had not then the courage to come back. How can reliance be placed upon appearance? It is impossible to discriminate between a sense of fear, of guilt, or of shame, especially when those sharp and lynx-eyed officers were after him, with full proof in their minds of his guilt. I am, now well-nigh through, and I know you feel glad of it. The last topic, therefore, I will speak of is in regard to the identity of his person—and here I will read my proposition, which is, that people are always liable to mistake where the attempt to identify is made by a stranger.

Now what are tests of identity? Identity is not only in the face. When I first saw his Honor, Judge Flinn, I was on the point of taking his hand, he was so like Dr. McCook, but when he spoke the likeness vanished. How often will one person meet another in the street and say, "Hoy d'ye do, Wiggins?" but when Wiggins opens his mouth to reply, the likeness fades away. A man's voice and a man's actions are part of his identity. I, myself, while pleading here, may look graceful and imposing, but place me in a parlor among ladies, and ten to one, that while bowing to one person, I'll jostle another over. The action, voice, motion, walk, etc., all go to make up a man's identity. You may swear to a man with his hat on, but when he comes to take it off, you behold, perhaps, a bald spot, which changes him entirely, and a man whom you have heard only speak once, to identify and hang him is too wicked an act to be thought of in this community.

Mr. True said that one of the causes by which he identified him was, because he talked of cholera in Quincy, and his conviction upon this that he was a medical man, and had practiced in that place. Why, he had never thought of practicing medicine while in Quincy, and his brother was surprised to find him practicing it here.

Marshal Ruffin had said when cross-examined, very snap-pishly, that when he first knew Arrison, he had but one eye-

brow, for his hair met. I have since proven the error of this: that although Marshal Ruffin might swear the hair off my eyebrows, he cannot swear you to the belief that Arrison's eyebrows were not always separated.

I refer now to the testimony of the set of witnesses, the four carpenters. Hiveley swore positively as to the identity of Arrison, the three others could not swear positively. Now, there was something peculiar in Hiveley's ways and manners—something which denoted that he had at some time labored under aberration of mind; he swears particularly about his dress, and that he wore a white Versailles waistcoat. Now, it takes much observation to swear so particularly about the articles of a man's dress. He swears, moreover, that he had no whiskers, that he had a white hat with a long fur, a frock coat and black pants, and that he was so dressed each time he saw him; that he was so dressed the morning he returned the box to be altered; but the other carpenters swear that Hiveley was not present that day. It was a hard thing to patch up the evidence of the carpenters. It was like Hand patching up his testimony by calling a witness aside in the court room, and that witness testifying on the stand as to what Hand told him three minutes before. It was a trick, but I don't attribute it to the prosecutor.

*Mr. Pruden.* It was your own witness, and therefore a trick of your own.

*Mr. Johnson.* There seems to be such a necessity for this man's blood that everything is disputed. It is remarkable that Hand testified so strongly as to the clothing found in the defendant's trunk answering to his previous description, and that McCullough should testify so differently. Kane swears he was present when the man ordered the box to be made and is certain that Hively was not in the shop, although Hiveley swears that he was. I recall the discrepancy of the evidence of the carpenters as to the clothing of the person who ordered the box made. Can it be possible that you will put a man to death—pour out your own brother's life blood upon the gallows—upon the testimony of four witnesses who

contradict themselves? I do not doubt the honesty of the witnesses, but it only goes to prove that men should be very cautious when they testify to the identity of a person whom they never saw before and who was a stranger to them. I am sensitive as to the case, and desire to go out of it with the reputation of having tried to tell the truth, and, therefore, shall only utter what the witnesses themselves stated on the stand. Both the journeymen carpenters swear that the man's hat was black, and that he wore a black coat and black pantaloons. The old man (Hand) swears his pantaloons were striped, and that he had often seen him wear them. Conklin said Hand had been in his office one hundred times on business. I have been a lawyer for five-and-twenty years, and in all my life never had a client to visit me one hundred times. Hand must have been one of the kind of men who sponge on young lawyers, get advice from them, and become some sort of lawyers themselves. I would advise every young lawyer to get up a mosquito-bar in his office to keep such things out. Ruffin said—and mark the peculiarity of the language—that he believed Hand because he knew what he swore to was true. He swore to the hair between the eye-brows, and he was proven to be mistaken. I venture that, without going out of this court house, I could put a man in Arrison's seat, and let Arrison stand behind the post, and bring in Hiveley, and he would swear he was the man he made the box for, and could not be mistaken.

The dark man in the background, whom Allison knew committed the deed, would go down to the grave with his secret. We have not attempted to prove an *alibi*, for the allegations are that the prisoner was not present at the murder. He might have committed it and been hundreds of miles off; therefore an *alibi* was not necessary. It is true they had been unable to find any one who traveled with him; the defendant was an obscure young man; he had never been Judge, or a member of the Legislature, or Attorney General for a county, or even Governor; nobody addressed him by a title. He was poor and unknown. He had lost his money by the conduct of persons of respectability, and he was going home, with



crushed and broken spirits, and conversed but little, if any, with any person. You can see how difficult it would be for himself or any man to prove an *alibi*; he might be like the poor man in the pitchfork case, have no witnesses save God and his own conscience.

I want to impress upon the minds of the jury to consider the case cautiously, and to establish beyond the shadow of a doubt that the defendant was the man before they find him guilty, so completely as to exclude every other possible hypothesis. In the language of Lord Hale, "it was far better that many criminals should escape than one innocent man should suffer." It was not that the criminal, if released, would be the great injury, but the shock upon the morals and rights of the community if the innocent should suffer. When a jury takes the life of an innocent man, it shocks the whole public morals and makes men wish a state of anarchy, when they would have no laws to govern themselves. I confide the case to the jury as men of fairness, men of candor, and understanding that they will weigh it well, and be convinced beyond every question as to the defendant's guilt before convicting. From the testimony, I am satisfied they can not convict.

*December 19.*

The excitement in relation to this extraordinary case continues unabated, if the immense multitude that daily throngs the court room during the progress of the case can be considered as evidencing the fact.

*Mr. Dickson.* New discovered testimony has come to light this morning, to wit: that on the visit of John King to the jail of Hamilton county, for the purpose of identifying the defendant, he pointed out a man named Poague. For the sake of the prosecution, as well as the defense, I ask that Mr. Garoot, one of the jailors, be permitted to testify to that point at this time.

The COURT. This is a matter that cannot now be argued by counsel—it must be by arrangement between counsel on both sides.

*Mr. Dickson.* May this matter now come in? I would not ask it if this was not a case of life or death.

*Mr. O'Connor.* It is certainly improper, and I will not for a moment consider it.



## MR. KEY, FOR THE DEFENSE.

*Mr. Key.* Though retained by the prisoner to plead for his life, I do not intend, nor is it my duty, to present any other views of the testimony than those I entertain. It is never good policy to do so. In every case the defense lies in the facts disclosed by the testimony; and he who expects to achieve a verdict by constructing a path through the agency of his own intellect, finds that he simply buries himself in the quagmire. Mere intellect is the meanest thing in the world; and, where it is alone trusted to, leads but to bewilder. It is only when stimulated by good natural emotions, and controlled by the moral sensibilities, that it becomes of any value whatever. I shall earnestly endeavor to base what I have to say on facts that were disclosed, believing that there was innate force in truth, which, even when employed by a man of the humblest abilities, was far superior to the combined forces of all the powers of the mightiest mind.

We have tried to select a jury from men not in the habit of listening to, receiving, circulating and exaggerating current reports—a class gossiping continually about what is strange in the community, and forming their opinions on those fleeting reports which Rumor, with her thousand tongues, is eternally circulating; and I feel assured that at the hands of this jury we shall have what was so earnestly sought—a fair verdict.

The law required every material fact stated in the indictment to be proved, and the Prosecuting Attorney has told you he expected to prove these alleged facts. The rules of the law are simple, and have become trite in the minds of every one. The first is, that every man is innocent until proved to be guilty; and that you are to incline your minds favorably to the prisoner's innocence. Another rule of law is that the facts must be established beyond reasonable doubt—a term upon which much labor has been expended in attempting the definition. No man has been able to describe it in a satisfactory

manner, yet most men understand what is meant by it—namely, that there shall exist in the mind a moral certainty of the guilt of the accused, and that the mind should repose on that certainty in complete quietude. Another rule of law to be regarded is, that the burden of proving, beyond rational doubt, every fact essential to the establishment of the charge, lies on the prosecution. Again, it is necessary the proof should be of such a character as to exclude, to a moral certainty, every hypothesis, except that of the guilt of the accused. These are the rules, few, simple and elementary, by which you are to be governed. The conclusion of the prisoner's guilt must flow naturally from the facts, and be consistent with them all.

There has been much progress in criminal jurisprudence (though, perhaps, not so much as in civil) within late years; and the principles most essential to a fair trial of the accused have been established in the State of Ohio, and are the law of this Court. Malice is a term on which mental philosophers and legal thinkers have in vain exhausted their powers. It is a simple emotion of the human heart, and can not be defined. No simple emotion can. It is sometimes spoken of, as that dark, sullen condition of a mind fatally bent on mischief, and utterly regardless of social order. There is no such thing known to the law of Ohio as general malice, that state of mind spoken of in the English criminal law books. A malice toward all mankind, a disposition to kill somebody, without reference to any particular individual, is a state of mind that never existed in any but an insane brain and condition of mind, and of which the law of Ohio takes no notice. Our statute says: "If any person shall purposely, and of deliberate and premeditated malice, kill another, he shall be deemed guilty of murder in the first degree," and in all cases it is required that the person charged with murder shall be proved to have designed the death of the murdered man, and not the death of some other person. It must be shown to the satisfaction of the jury that the prisoner purposely killed Isaac Allison. There is no such thing in Ohio as a "legal

presumption of guilt," of which we find something in the English law books, though I do not know that such an absurd rule continues at this time in England.

In every case where a man is charged with a criminal offense, the question to be determined is a question of intent; the question of guilt is in all cases a question of intent. Examining the hypothesis of the prosecution and its rational probability, it is the most improbable that could be suggested in the present case; from the antecedents of the prisoner, his birth, education, his associations, etc., he could not have been the perpetrator of the deed, and the circumstances by which it is alleged to have been carried out, as well as the act itself, are in antagonism with every trait of conduct and every rule of life which heretofore characterized the defendant.

*Mr. Key*, in reviewing the question of probability as to whether a man possessing the character which defendant had received, gave a concise history of his career, adverting to his early engagement in agricultural pursuits, academic labors in preparing himself for some employment in which his intellect would be the chief instrument of success, his travels to California, an engagement in the laborious life of a miner, while accumulating sufficient means to return to this part of the country and complete his professional course of study; and on his return, by the way of the Isthmus, he goes first to see his parents in Iowa—everything tending to show his observance of that command given to all men under circumstances of such solemnity—to honor his father and mother; and he indulged in the hope that in the case of this defendant there would be no want of realization of the fullness of that promise that his ways would be long in the land.

The testimony showed that Allison was a man of violent temper, and had become determined to inflict an outrage on the body of this man. Arrison, a few days before, had borrowed a pistol to shoot a dog, but that dog was not Allison, for he had been attacked by a dog, and showed the rent in his pantaloons. He had not that implement when Allison struck him; he stated that if he had had it he would have used it,

but he appealed to the jury whether in language or conduct Arrison could have exhibited more forbearance than he did? The fact was, that Arrison is a brave man, and comes from a brave stock, he did not, on that occasion, rise up to the average degree of resistance and combativeness which American young men possess. The barn-yard fowl that will not maintain himself in his own walk, is by universal concurrence, considered fit for nothing but the spit.

*Mr. Key* discussed the question of identity at length; adverting to the conflict of testimony in relation to the dress which it was alleged the accused had worn on particular occasions, and to the testimony of Hand, who, it was agreed was a gassy, fussy, meddlesome, talkative man, who caught up all current reports, and retailed, circulated, and exaggerated them; and whose conversations, unless under oath, were not to be considered as at all worthy of notice.

The idea of the torpedo coming from some other source than from the defendant was to be strongly considered by the jury. It had early suggested itself to the counsel for the defendant, and in the progress of the case, the impression had ripened into full belief that this horrible transaction, which, from its moral features, had caused a deeper thrill of horror than that caused by the multitudinous explosions at Sebastapol, would, when properly investigated, be found not to contain the element of murderous intent; and, surely, if there were any hypothesis that could be adopted without violence to reason, that would exclude the idea of murder, by all that they owed to the prisoner, to his friends, to this city, which had been so dishonored by the act, they were bound to adopt it, and strip the case of its horrible aspect. We believe that Isaac Allison had a knowledge of the torpedo in the box before it was opened. It had been constructed during his unaccountable absence from the hospital. From his associations and past life, he was likely to have some knowledge of a machine of this description.

But say that Mr. Allison had knowledge of the character

of the box; it will be asked, What had he to do with it? Did he intend to murder? It is wrapped in mystery. But it will be remembered that Dr. Baker, in the prosecution of his enterprise, borrowed money from all around him. He not only borrowed from Arrison, but he also borrowed from Allison, and neither could obtain a settlement. Arrison pleaded, implored and almost begged, but in vain; and if any one would have been paid, it would have been him. And now, in such a mind as Allison's might not the thought have occurred that the money should not avail the borrower, and he accordingly had this box concocted, not to destroy life, but property? Such, most likely, was the thought of an angry creditor against a recusant debtor. And what in this case was so likely as that Allison, the deceased, should determine that the money (lent to Dr. Baker) which had passed beyond his control, and had been put into that building in these improvements, should not avail him (Dr. Baker), and that some satisfaction should be taken out of the recusant borrower. It was more reasonable to suppose it was sent there to destroy property than to destroy life—to work a revenge on property, rather than to work the destruction of human life.

The box might have been placed near the lecture-room, and so arranged, with a string attached to a ring upon it and the handle of the door, that when Dr. Baker, who kept the room, opened it, the box would explode and destroy the furniture in the room. I admit that the fact of there being slugs in the box is inconsistent with this view of the case, but the whole history of the affair is inconsistent. It was impossible to reconcile all the inconsistencies; but the jury should beware of drawing an inference which conflicts with other rational hypotheses. Recollect the other remarkable expressions made use of by the dying man, and his desire to make a disclosure to Dr. Baker alone.

I express the assurance that William Arrison will not die on the gibbet—and that the verdict of this jury will not place him among these monsters of our race whose statues fill the temple of infamy.

## MR. PRUDEN FOR THE STATE.

*Mr. Pruden.*—It is with no ordinary feelings of responsibility that I arise. You have been entertained since Friday evening with the arguments of the counsel for the defense. I shall answer a few of the counsel for the defense. It is not unfrequently that jurors in this, as in all courts, pay but too little attention to what may be going on. I am happy, however, to say that the present jury have been remarkable in the attention and patience they evinced. In my remarks I shall refer only to facts, for it is upon such that the state relies to make out its case. To the counsel for the defense, who have occasionally exhibited some evidences of irritation, I have no feeling of animosity; neither have I against the prisoner. He cannot complain of the want of ability manifested in the management of his case. It was conducted most excellently and ingeniously, and yet I thought it curious that Judge Johnson, after speaking several hours, should separate his case into divisions—firstly, secondly, thirdly and fourthly. He reminded me of a certain pracher who in his sermon said he would divide his discourse into three parts, and in this manner: “I shall pass over the world, touch lightly the flesh, and hasten as fast as I can to the devil.” But he evades the whole question presented, and always throngs before you the raw-head and bloody-bones side of the case.

In most of the cases referred to by Mr. Johnson as illustrative of the danger of receiving circumstantial proof, there is the element of perjury; and more than that, these occurred generally more than a century ago, when human life was not generally thought worthy of preservation; in fact, the smallest theft was then punished with death and I do not believe for an instant that a jury could be found at this day in Hamilton County that would, for a moment, entertain a case of murder, predicated upon such testimony as these convictions were had on.

I say I have positive testimony as to the identity of this defendant. The cases quoted by Mr. Johnson rely upon the tes-

timony of one or two witnesses to prove the guilt; but in this case I have produced not less than forty-five witnesses. I have proven the identity of this man; but has he made an effort to prove an *alibi*—has he attempted to prove that he was not here on the night of the explosion? He left on Monday night or Tuesday morning for St. Louis; but has he produced the clerk of a boat to show the record of his name as a passenger, or the books of any hotel whereon his name was registered. On the contrary, he changed his name when he left Mrs. Campbell's boarding house. There is a vast difference between the fact of one or two witnesses combining together for the purpose of the destruction of an individual, and that of forty-five witnesses who had no cause of enmity.

I call the attention of the jury to the case of Thatcher Lewis, who so mysteriously disappeared a short time since in this city. It was almost impossible to procure any respectable lawyer to prosecute the case, because the body of the alleged murdered man had not been found, and those who should bring the prosecution would be liable for damages. This proves conclusively that no jury at the present enlightened day will find a bill without good and sufficient reasons. Having thus, gentlemen of the jury, again called your attention to those authorities of import that have been quoted, I now come to the case at issue.

*December 20.*

*Mr. Pruden.* I claim conviction, not on the testimony of one, two, three, or a half dozen witnesses, but I bring here forty-five witnesses, of different occupations, unacquainted, who point irresistibly to the defendant as the man who committed the crime alleged against him—witnesses who don't know each other, have not conversed with each other on the subject, and who were never before an examining court. Not one knows what the other said in this Court, only a few of them going before the Grand Jury, and then only one at a time. There is no concert of action, no combination, no agreement, no motive, no malice shown in these witnesses; but they come up, and their evidence points out Arrison as the man.



At the present time we have cases upon cases of persons accused of crime being discharged from want of evidence. At the present term of the Grand Jury seven cases out of seventeen were ignored from the want of sufficient proof. There was no substance in them. I remember at one term of the Grand Jury under the old system, when Grand Juries met but four times a year, that I gave an order for the discharge of twenty-two prisoners from jail, there being nothing to substantiate the charge against them; and, be it remembered, Grand Juries only hear one side—an *ex parte* statement of the case. It is different now, gentlemen, from the age and time that Judge Johnson referred to in citing his extraordinary cases. Then juries were mere machines. There was not the intelligence and enlightenment of the present time. Centuries ago, even some of the great lords and judges could not write their own names; but at the present age almost every man can read and write, and we are surrounded by the elements of intelligence, and the means of acquiring education are accessible to all. We do not now attempt to convict without facts warrant such a conviction. Some time ago the Grand Jury, during the confusion of business, found a bill of indictment against a man for bigamy. I informed the first wife that she must procure the proper certificate of her marriage, and the evidence of her husband's second marriage. Upon looking at these certificates I found that one marriage took place in New York and the other in Indiana. The crime did not come under the jurisdiction of the laws of Ohio, and so I informed the Court, and I entered a *nolle prosequi* in the case. A century ago the man would have been convicted. It is not long since when I had a case of a woman arrested for infanticide. The child was found dead in a sink, and the testimony was conclusive as to the woman being the mother of it. Some witnesses swore positively to the mark on the throat of the child, and there was evidence of the mother's guilt. But, there was no evidence before the Coroner's Jury that the child had ever breathed—no *post-mortem* examination had been made to ascertain if the child had ever lived.



The law presumes every person innocent until guilt is proved, and upon this the Grand Jury found no bill against the woman. No court in this age would permit conviction of such a case unless there was positive evidence of life in the infant before being found dead.

A singular case came under my observation, of an Irishman accidentally shooting and killing another while out on a hunting excursion at North Bend, and the fear of the man caused him to tell so many contradictory stories that he was arrested and charged with the murder. There was no malice between the deceased and the prisoner; they were both friends, and the circumstances of his direct confession to his attorney afterward, and the singularity of the position of the body of the deceased when found, satisfied all of the man's innocence, and he was acquitted. I did not consider it a proper case for conviction.

We occupied from Monday morning to Friday evening, in presenting the testimony of this case. We began with the acquaintance of the deceased and the defendant. We proved that they were both engaged at the Marine Hospital; the deceased as steward, who with his wife had charge of the house, and the defendant as house surgeon, in the absence of young Dr. Baker. We proved that differences arose between Allison and Arrison, and that a natural ill-feeling grew up between them. The defendant borrowed a book from deceased, and the latter afterward demanded \$1.50 from him in payment for it, as it had been soiled. Defendant said, "Why do you charge me more than I can purchase one for at the store?" The deceased replied, "Because you are a mean man." The defendant answers, "You are a knave." Then the lie passed between them, which resulted in a fight. According to Blackburn's testimony of Allison's statement, the defendant gave the first blow, and the deceased then knocked him down. At the time of their separation at the hospital, after the affray, the parties were not on speaking terms. They had their quarrel, and on the next Friday or Saturday the defendant borrowed a pistol from Blackburn, as he said, for the purpose of

shooting a dog. He retained it, and Blackburn subsequently asked him for it, but did not get it. On the Friday before the explosion he returned it, and, in conversation, said to Blackburn, "Jake, I'll be even with him yet." Mark, gentlemen, this was on the day after the box was made, for on the day previous (Thursday) the defendant went to the carpenter shop and asked them to make him a box. He wanted it of hard wood, such as cherry or black walnut; he had a string with him to give the carpenters the measurements of the size of the box. The carpenters told him they had no cherry, but that they had a pretty piece of black walnut, which was satisfactory. Then comes the style of box he wanted; not the usual sliding lid to pull in and out, but so fixed that the lid may be put down in the grooves square, and the groove pieces screwed down. He wanted it that evening, and in the evening he came for it, Mr. Hiveley was there when the box was ordered, and he was there when the box was called for at 7 o'clock in the evening, an unusual hour, directing Mr. Hiveley's attention more particularly to the man. He then wanted a screw-driver, promising to return it in the morning; but in the morning the screw-driver is not returned, but the box is, because it is not long enough to allow the tube to be place in it. The young man, Kane, commences to gouge out the box; McCullough comes in, and takes the job out of the hands of Kane. Hiveley recollects that there was a small shoulder at the bottom of the end piece, and that the man said it would do; and he swears positively to the box. You remember he told Michael Travis that he wanted it strong, because it was to be used to send a present to his aunt in Iowa. You will recollect, in this connection, that Hand asked him, "What do you want this box for?" He replied, "Ask no questions and I will tell you no lies"; but upon the question being repeated, he says he wanted to send a present to his niece. Mr. McCullough says this is the last time he saw the man until he saw him in the jail. The witness says, as he went by the door, and was about returning, he recognized the defendant; and when he was asked to look around this room, in court, he says, "From the best of my rec-

ollection, that is the man." Hiveley says he saw him first on the morning of Thursday; he saw him on Thursday evening when he returned for the box; the next afternoon on Fifth street; saw him when screw-driver was returned; and again on Sunday on Western-row—six times altogether.

The journeymen carpenters swear that they think the defendant is the man, but they do not precisely concur as to the dress. It is not improbable that he should dress differently at different times. Here are four witnesses from the same shop who recognize the man, but differ slightly as to his dress. If they had got together and sworn precisely alike, you would have been told that there must have been a combination among them. I am willing to admit, to some extent, that if they had all sworn precisely to the same thing, that you would have been justifiable in disbelieving what they said. How can they differ? Why, one sees at one point, another at another—one sees correctly, another, perhaps, hears and infers. From the mass of testimony, however, you can sift the truth, gentlemen; you can investigate and compare, and see who tells the truth. These witnesses are honest, conscientious men; they give you all they know, and ask you to investigate for the truth. According to Travis' testimony, the defendant got a gimlet, besides a screw-driver. He also got a false lid—a piece of white pine—and Hiveley says he bored a hole in the center of it, about the size of this pistol-end. George Hand says that when he gouged the lid out, the defendant had the pine board with the hole in it with him. The testimony of Hand is corroborated by Hiveley, the testimony of Hiveley corroborated by Hand, and the testimony of Travis corroborates both as to the false lid. The defendant returned the tool on Saturday morning. The lady witness says he informed her that he would leave for home that afternoon, but accompany a lady and gentleman going the same way, stating that he was going by telegraph or the "lightning line." There is no evidence where he stopped on Sunday, although he is seen at the Gibson House, but there is nothing to show that he registered his name there; if he did he assumed a fictitious one. Where do

we see him next? On Monday afternoon, about 3 o'clock, we find him at Hall's, No. 14 West Fourth street. Mr. Robinson and Mr. True were there. The defendant entered the store with a card in his hand, and asks Robinson for pen an ink; but before receiving the pen, asks Robinson to write a direction on a card for him; Robinson placed the card on the counter and is about to commence writing as he would direct a letter, when defendant stops him and says: "Commence it up higher, near the corner." He then said: "I want you to write on it, Mr. Allison, Marine Hospital, corner of Longworth and Western-row," which he did. Robinson thought it strange at the time that the man did not write it himself. They then got in conversation in relation to the cholera, which occupied fifteen or twenty minutes; defendant said he knew all about the Marine Hospital, the number of cholera cases there, and the manner of treatment. He told True and Robinson of Cartwright's theory on the practice of cholera, which he jestingly said was to coat the alimentary canal with calomel, thus curing the patient of cholera, but killing him with calomel. He said he was in Quincy, Ill., in 1849, when the cholera was there and knew all about the treatment of it, and could judge of a case as soon as he saw it. After defendant went out True remarked that he thought he had seen him before, but could not recollect where. He afterwards recollected that he had seen him at Dr. Salisbury's drug store, where the defendant formerly stayed, and where Mr. True went for the purpose of seeing Dr. Holt, an old friend. True spent the afternoon there; defendant was there. He recollected the circumstance of a wrong tooth being extracted for a lady. Dr. Holt and Dr. Salisbury recollect the same circumstance. Dr. Salisbury further testifies that there was an English Reader in the store, and defendant sometimes read aloud. This confirms Hand. The recollection of the witnesses all concur that the defendant had a very heavy beard, or that he was beginning to raise whiskers. The defendant's brother swears that William lived at Quincy, Ill., in 1849. The student of Lane Seminary says he saw defendant at Quincy in 1849. The defend-

ant is undoubtedly, from Hand and Robinson's testimony, the man who got the card written.

If Robinson's, True's, Hiveley's and McCullough's testimony was not credited, why did not the defense bring witnesses to swear they would not believe them under oath? If there was a combination between them, why not show it? No. The defense resorted to inuendo and intimation of credibility to break down their testimony. Robinson says the defendant is the man who asked him to write the card, and his testimony corroborates Mr. True's, both as to the card and conversation. There was something about the man that attracted Robinson's attention. The defendant remained there and conversed. Robinson swears positively that this card is his handwriting, and you must admit that every man knows his own handwriting. If the writing was not Robinson's, why did not the defense send for some of his handwriting and prove by the experts, Gould and Burkhardt, to the contrary? They dare not, and did not venture on this ground. That, gentlemen, Mr. Robinson, wrote this card, and the defense must have taken it for granted that he did, for, although they endeavored to argue that there were two cards in the room, they did not ask Robinson if he wrote them both. It is a business card, and every letter of the printed matter, with the exception of the "O" has been obliterated by scraping. At the time Robinson wrote it the printing was on it, but it was erased afterward. The card was written on Monday, between 2 and 3 o'clock. Where do we next find the defendant? There is no trace of him until dusk. He is found then on Plum street, near Perry, on the sidewalk. He met there two boys, John King and Gershon Somers. They say that the defendant came up to them with something in his hand, and asked them if they wanted a job. Somers replied, "No." King said, "Yes," and asked him what he wanted him to do. The man said, "I want you to take this box to the Marine Hospital." The boys then go with him up to Longworth street, half way between Plum and Western-row, and in sight of the Hospital, where he gives them the box, and says, "Take it to

Mr. Allison, at the hospital." The boys, from fear, did not want to go into the hospital, but said they would take it to the hosiery store below. They took it there and delivered it to Charles Jackson. They returned, and the defendant crossed the street and went toward Plum street. Miss McLaughlin testifies that she saw a man on that evening hand a box to John King, and that she was acquainted with King. She corroborates the statement of the boy, King.

Young Jackson, who received the box from King, takes it and reads the card, and places the box on the counter—he being in the store alone. He picks up a newspaper and lays his hand upon the box while reading. If his hand had slipped the lid he would have been blown into eternity in an instant. He takes the box afterward to young Dr. Baker, who is sitting in front of the hospital, and says, "This is for Mr. Allison." About this time Dr. A. H. Baker, who is upstairs attending to the sick man, King, asks his brother from the window to bring him up a preparation of caustic. Young Baker went into the house, and while getting the preparation laid the box on the table. Dr. Cummings, who was present, read the card, picked up the box and shook it; he thought he heard a rustling inside, and afterward attributed it to the paper on the outside. Recollect, gentlemen, that the defendant told the boys not to turn the box upside down. It was because the priming might fall out. Young Dr. Baker, after procuring the medicine, takes the box, goes upstairs, meets Mrs. Allison and hands it to her, saying, "This is for your husband." She took it to the front room. Allison, who had been conversing with the doctor, passed into the same room. Dr. Baker, in a moment afterward, was in the act of cauterizing the chin of Midshipman King, in the room opposite the hall, when the explosion took place. One of the watchmen testified that Allison, in his dying statement, said, "I opened the box, and as I pulled the lid I saw what it was, but it was too late." What he saw, gentlemen, was the explosion of the priming. It was this that burst the box. Allison saw the flash of the priming, but it was too late, for in an instant the bomb exploded. The

gentlemen say it is impossible that the bomb should be broken into fragments by the explosion and the wood of the box not have been shattered. I have proved to the contrary by Mr. Greenwood and Mr. True, both experienced mechanics and engaged in business for years. Mr. Greenwood tells you that the weakest point always gives way first. Here is a piece of three-quarter inch solid black walnut; all that fastens it together is slight brads or sprigs. All of you could pull off the ends and bottom of the box; but where is the man who could split the wood with his hand alone? The strength of powder is according to resistance. The priming burst the box, and it was separated before the entire machine was ignited. It gave way in the weakest points, and was not injured by the force of the explosion. Mr. True explains this by telling you that when a gun is shot off the wadding will fall within ten feet from the gun, while the main resisting power (the bullet) speeds on its way. We find that upon the testimony of an eminent chemist, that the shell had been exploded by gunpowder, and also that the burns on the box had been produced from gunpowder. We have in evidence that the defendant, on Friday previous to the explosion, went to Adderly's drug store, on Sixth street, between 12 and 1 o'clock, and asks for gunpowder. Upon being told that they had none, he inquires for twine; was shown some, but said it was not strong enough. He was told to go to a grocery opposite; he goes out, but returns in a few moments and gets some that was previously shown. After he goes out, Adderly asks, "Who is that?" Mr. Porter, who was in the store, says, "Why don't you know? that is the celebrated Dr. Arrison." Mr. Porter knew him; he was introduced to him at a temperance party at Carthage by a lady, and he is not mistaken in the man. William Adderly recollects him well; and Mr. Samuel Cloon, who was also in the store, recognizes the man. But the defense say the defendant was going west, and it was not strange he should want gunpowder. Why, the first thing they have in a country store, especially in a new country, is gunpowder, shot and lead. The defendant did not need powder to take such a dis-



tance. The difference in price and the risk of conveying it would not justify him carrying a pound of powder to Iowa.

The defendant said to Dodson, who met him on the street on Monday evening (the night of the explosion), that he was going away and his things were at the depot. The defense say that he had his baggage from Saturday to Monday evening at the river, some place or other, waiting for the river to rise in order to get a boat. The truth is, he had his trunk at the depot, as he stated to Dodson, and was ready to start by the first train after accomplishing his object. He could conceal himself in the city easily and be prepared to leave at a moment's warning.

It had been urged as an objection to the testimony of the officers who arrested him, that they have an interest in his conviction on account of the reward. Gentlemen of the jury, it is not the carpenters, or the witnesses upon whose evidence I relied, who get the reward. It is the Mayor, the Captain of the Police and Deputy Marshal Lee, who, having arrested him, that are entitled to it. And although I consider their testimony as of little moment upon the bearing of this case, still I will refer you to the best American authority to show that they were competent witnesses, in spite of the reward.

Judge Story says that in some instances innocent persons have been convicted upon circumstantial evidence, but he admits those cases to be rare, and states, moreover, that people have as often been convicted upon positive evidence, through perjury, as upon circumstantial evidence. Chief Justice Whitney, of Maine, has said that circumstantial evidence is often stronger than direct evidence; and Justice Park observed that it was impossible to get at truth without a concatenation of circumstances.

Now, the witnesses for the state were brought together without having the slightest opportunity to concoct their plans; they were, for the most part, unacquainted with each other, and yet their testimony all pointed to the same conclusion.

Here is a well-known case in which circumstanital evidence was proven infallible: In an Indian settlement one of the in-



habitants lost a horse, and it was declared that the man who stole it was a small white man, with a short gun and a little dog. Now, the reason of this conclusion was that he had left his foot-marks in the snow, the hoofs of the horse were unshod, the track of a small dog was also impressed upon the snow, and the whole led to a tree, against which he had laid his gun, the butt resting upon the ground, the end of the barrel against the bark, which told the length of the weapon. The man had shoes on, which proclaimed him not an Indian. Pursuit was made, and the man was captured with the horse. Now, this was circumstantial evidence of the slightest kind, and yet the conclusion was most correct.

One of the counsel for the defense said, rather sneeringly, as I thought, the other day, while reading Holy Writ, that I might not, probably, regard that book as a test. Gentlemen, I will cite you a decision made on circumstantial evidence from the same book, namely, the decision of King Solomon in reference to the child claimed by two women.

What do you know of your own knowledge in comparison to what you derive from circumstantial evidence? How do you know that Solomon, or that George Washington ever lived; or that Queen Victoria lives; or that there is such a place as England, except on presumptive testimony? Do you know that when you plant the kernel it will grow? The merchant freights his vessel to other countries; but unless he has visited that country how is he sure that it exists? He writes to his agent there, and he receives his reply, and it is from this presumptive testimony and not from his own knowledge. You don't know that the sun will rise tomorrow; or that the moon will shine tonight; or that, in fact, it is made of any other commodity than green cheese.

I next pass to the question of malice; and here, gentlemen of the jury, you will remember that the defendant and the deceased had a fight. Judge Key has said that they had made the matter up, and that there was no malice, and that it might have been the intention to destroy the furniture of Dr. Baker's house. If so, why not have directed it to Dr. Baker, unless,

indeed, it was meant to kill two birds with one stone. Why what sort of theory is this? Would Allison want to kill himself and wife? Why write his own direction on a card? Why not have carried it to his house himself? But no—when the parcel arrived he said gleefully to his wife, “We’ll show Dr. Baker the present you have.” The gentleman has argued upon his dying confession about Connolly, and has dwelt upon his acquaintance with that individual, of whom it is said he knew a secret that would consign him to the penitentiary. But is it necessary that a man should be branded as a bad character because he happens to know one of that stamp?

Much stress, too, has been laid upon the antecedents of the defendant’s family. You have had painted the deeds of his father, who had fought in former wars, of his brother, who had battled in Mexico. The prisoner’s counsel knowing that you, gentlemen of the jury, are mostly farmers, have expatiated largely upon the impossibility of one, the son of a farmer, educated in the country beneath a rural roof, entertaining and carrying into execution such a diabolical scheme. Why, gentlemen, the first murderer upon earth was a farmer, Cain, who killed his brother, Abel; and here, gentlemen, I will read you from the *Western Law Journal*,<sup>19</sup> a description of that first murder, and what constitutes the difference between passion and malice:

“It is not always an easy task to distinguish between passion, the *furor brevis*, of the blood, and the malice aforethought of the law; yet in most cases there is a clear dividing line. Passion is hot, malice is cold; passion is hasty and rash, malice is circumspect and slow; passion obeys the first impulse, malice broods, and meditates, and plans; passion is surprised at the act, malice debases and degrades him; passion is an erring spirit, malice is a fiend; passion was given to man by his Creator, but malice was born in hell! When Peter the Apostle smote the Centurion, passion impelled the stroke; but malice guided the stroke of the first murderer. It is instructive to study the record of the first murder on earth. The details are not minute, but enough is given to distinguish between the infirmity of the flesh and blood and the deeper wickedness of the heart. When Cain saw the acceptance of Abel’s offering, and the refusal of his own, ‘he was wroth, and his

<sup>19</sup> Vol. 6, p. 479.

countenance fell; but he did not then strike. The Deity asks him why he is wroth. He is silent. The same power assures him that his offering was not accepted because it was evil. Cain is still mute. There is no outbreak of feeling in word or deed. He speaks neither to God nor man. His purpose not yet developed in his heart, he goes his way, brooding, meditating, planning. The place of the altars is not to be the place of revenge. The first human blood shed on earth is not to be shed near the scene of sacrifices. He seeks an opportunity to lead Abel elsewhere, and when he has seduced him into the fields, he rises and slays him. The stranger Death was not introduced into the world by passion; he came under the ministration of the cooler, subtler, slower, and more circumspect field—malice."

He who has beheld the picture of Cain and Abel, by David, has seen the malice aforethought of the law spread upon canvas. True to the instincts of genius, the artist rejects all exhibitions of vulgar physical death. He presents no broken skull, no clotted gore, no dead body, but the more terrible tragedy of murder conceived and maturing in the guilty heart. The time of the painting is the interval between the scene at the altar and the death. Cain is sitting in the shadow of a rock; his clenched right hand indents the rigid muscles of his thigh; the left grasps tightly a rude implement of husbandry; his breast is expanded, and his legs compressed; his eyes are lurid and bloodshot, and fixed on vacancy. At his left side, and beneath him, sits his eldest boy of two years old, gazing up at the strange, unwonted aspect of his father. On his right is the mother of that boy, gazing, too, with anxious concern upon the face of her husband, darkened for the first time by the shadows of a mind brooding on blood. A child, still younger, unconscious of the portents of crime, plays innocently at their feet, while in the dim and distant background, through a fissure in the rock, Abel is seen by the spectator (not by Cain), near his altar, at his devotions, unconscious as the infant of meditated or coming harm. The murderer himself sees neither wife, nor child, nor victim. He is busy with guilty thought. He is maturing his scheme, at war with "social order"; he is shaping his "former design"; he is bending his heart "fatally to mischief." This is the malice aforethought of the law. This is the "willfulness," the "deliberation," the "premedita-

tion'' necessary under our statute to constitute murder in the first degree.

Gentlemen of the jury, why was it that when Arrison met Hiveley on Fifth street, and other places, that he did not recognize him? Why, simply because his mind was totally bent on destruction, and he was totally unconscious of all else beside.

Now, gentlemen, for this man to keep his own secret was a matter of impossibility; hence you find him writing to Mr. French, inquiring how public opinion was in Cincinnati. He goes home, he is tracked, there is a search for him, and he makes his escape by the back door. He then sends his brother to Cincinnati, while he goes to Iowa. He again writes, under a fictitious name, to his brother, inquiring again the opinion of the public. Gentlemen, I have not one word of reproach for that brother. I honor him, as I sympathize with the poor mother; but you and I must do our duty. Mark, gentlemen, the fear of the prisoner when he found that the brother had written to their father. He naturally thought that it would draw the suspicion of the authorities, and, after having evaded them so long and cleverly, that they might track his hiding place and capture him at last. How anxiously in his letter he instructs that brother to call on A, B and C; that letter which, by a slight mistake, in the letter "O" being taken for a "C," as if by the interposition of Providence, fell into the possession of another party. "Walk in," said he, "to each of their houses, make your true character known; operate particularly upon the sympathies of Dr. Chapman; I have reason to think that he is my friend." Now, if innocent, why operate upon the sympathies of people? A guiltless man requires no intriguing. But he was anxious to know what new facts had developed themselves. He wished to know if anything more had been discovered against him; if, while boarding at Mrs. Campbell's, some prying eye had detected him making the bomb and arranging the box. Does an innocent man want to learn if anybody knows anything against him? Why did he run away? Why did not you or I, or the inmates of the

college, leave? Why did he leave his trunk at the railroad depot on Saturday, when he knew that he would need a change of clothes for Sunday? He knew that Allison was not at the college then, but he knew when he would be there. Why does he not produce the register of the steamboat with his name inserted? Why was he on Western-row on Sunday, peering about, but to watch for Allison, for he knew that Allison's windows looked out on Western-row, and while watching there with murderous intent, the soft music of the church bells were pealing forth their invitation to come to the house of prayer; but the early lessons and precepts of his mother were all forgotten in the pursuit of his one dire intent, and the time, the place, nor the association connected with those bells, as the poet so beautifully describes:

"Those evening bells, those evening bells,  
Ah. many a tale their music tells,  
Of youth and hope, and that dear time  
When last I heard your soothing chime,"

could not turn his thoughts from their dark project. Talk about his good character! How absurd! It is true, as testified, that he went to worship at the Baptist Church, in Catharine street. Mr. French testified to this fact, and that he always behaved well while there; but does this prove anything? Why, Manchester, the banker, went to church on the Sunday before he closed, and people would have called him a devout Christian and a good man, and a few days afterward widows and orphans found he was a swindler, and a worthy subject for the Ohio penitentiary. Dr. Webster, who murdered Parkman, stood high; and I remember, since I have been in office, the case of an old citizen, who for forty years had stood high as any citizen of Cincinnati, and yet it was proved that he had for years been dealing in stolen property. While upon his trial, Nicholas Longworth and a host of the most respectable residents testified to his good character, but their business did not lead them to investigate his transactions, or pry into the mysteries of the police office.

The Court, gentlemen, will tell you that good character is

a defense, only when the case is doubtful. The prisoner's good character has not proved that he did not fight with the deceased; that he did not borrow a pistol, and did not use the expression, "I'll kill him yet," that he did not have the box made and the card directed. Forty-five witnesses have been examined and all identify him. Their evidence points to and centers upon him as truly as the rays of the sun to the earth.

I had almost omitted to call attention to the statement of Judge Key, that this might be a case of manslaughter. Why, gentlemen of the jury, if this be not a case of murder in the first degree, it is nothing at all. Look at the fact of five days being employed in framing the murderous implement, and the idea of its only being intended to destroy property, when at the same time that it was charged with slugs, is preposterous; it is, as I before said, either murder in the first degree, or it is nothing at all.

Now, you will recollect that when the explosion at the college took place, Dr. Cummings thought people were shooting; others thought that a cannon had exploded; Dr. Baker thought that the house was struck by lightning; the halt, lame and blind rushed to the windows, and it was with difficulty that they were prevented from casting themselves out. Dr. Baker went to Allison to ask what was the matter. "In the name of God," cried Allison, "come to me, doctor, for I'm murdered." Mrs. Allison, at the same time, shrieked, "Come to me." Allison, whose bowels were protruding, and who had crawled into the next room, hearing the piteous accents of his poor wife, and regardless of his own acute sufferings, gasped: "Go to my wife"; while still that constant woman, sightless, mutilated and bleeding, with one arm shattered and hanging by a slender thread to her lacerated body, convulsively lifting her bloody stump in the direction of her unhappy partner, refused all aid until he was attended to. And yet we are told of this man's brother, and our sympathy is sought for one who has committed this deep and damning crime. Nay, more: even now, that in his cold grave, the grassy turf resting upon

his murdered corpse, they make an effort to blacken his character in order to exculpate the prisoner. And what do they say? Why, that he was arrested, lodged in the watch-house. And what was the upshot? Why, that after being detained there seven days he was discharged; and Mr. Dickson, who was then the Prosecuting Attorney, declared himself satisfied of his innocence.

*Mr. Dickson.*—I never declared that I was satisfied of his innocence.

*Mr. Pruden.*—Well, Judge Spooner said that he was. And why was he arrested? Why, upon the vague suspicion of two or three people, who, very probably, after his arrest, for the purpose of detaining him, slipped something into his pocket. They suspected him of being concerned in robberies committed at St. Louis; but he said, "I am innocent: detain me until I am proved so." He could have been bailed, but for seven weary days and nights he remained in that cell, with his faithful wife, with a devotion above all praise, notwithstanding that her woman's ears were outraged by the language of the drunken men who were brought during that time in proximity with her. Does she not, in her faithful devotion, remind you of the Ruth of old? Has there ever been evidence of more undying fidelity than this? She had watched over him in sickness. Her hopes and her affections were centered in him alone, and even in those dreadful moments, while mutilated, sightless, and writhing in pain and anguish, her thoughts and her inquiries were only of him. "Is my husband dead? Without him I do not wish to live!" While he regardless of himself, before the death-pang parted soul and body, cried, "O, doctor, for God's sake take care of my poor wife. She is mutilated and a cripple, and will have none to care for her when I am gone." Tell me not that a man like this was a bad man. To assert so is a damnable attempt to blacken his character—to break his already mutilated bones.

Gentlemen, you are told that it is dangerous to convict upon circumstantial testimony, and juries too frequently think that their verdict alone condemns the prisoner to death. But it



is not the verdict any more than it is the testimony of the witnesses, or the officers who made the arrest. You are called to render a true verdict according to your consciences, and to which you are sworn before high Heaven. If you acquit this man from conscientious scruples only, then you perjure yourselves. You are no more responsible for his death than the man who makes the gallows, or the rope, or Sheriff Brashears, whose duty it is to fulfil the last sad office of the law. It is the people and the law who are executioners.

It has been my duty to present this case. I am responsible for its faithful fulfilment. You, gentlemen of the jury, are equally responsible that you faithfully perform your duty. The pardoning power rests with the Governor. The Court, after you, has its duty to perform, and then, having discharged our obligations to our country, to our God and the law, we have done.

Gentlemen, I have finished. All I hoped was to call your minds to the leading facts of the case. I did not deem it necessary to argue every point made by the defense. I have discharged my duty; it is for you now to discharge yours.

#### THE CHARGE TO THE JURY.

JUDGE FLINN.—Gentlemen of the Jury: The defendant, Arrison, stands charged by indictment with the murder of Isaac Allison, on the 26th day of June, 1854, at the County of Hamilton, under the following section of the Crimes Act: "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or cause the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree."

The indictment contains two counts, varying only in the description of the instrument used by the perpetrator of the act. You are to inquire, gentlemen: 1. Whether Isaac Allison is dead. 2. If so, you will inquire, did he come to his



death by violence at the hands of Arrison, in the manner and form as charged in the indictment?

It is the duty of the state to prove the affirmative; to prove the facts and circumstances by the evidence; the affirmative of the allegations, as set forth in the indictment, beyond the question of a doubt. When we speak of reasonable doubt, we mean that kind of uncertainty and doubt that would shock and stagger the mind of an honest inquirer after truth. We mean reasonable doubts in contra-distinction to mere captions or quibbling doubts, or, in the language of a learned Judge of our own Supreme Court on this point, as follows:

“We have frequently used the expression ‘convinced beyond a reasonable doubt.’ It is necessary that you should understand what we mean by the expression ‘a reasonable doubt.’ A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial and diligent jury, after a full and careful consideration of all the testimony, with a single eye to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt, voluntarily excited in the mind, in order to furnish a pretext for avoiding the rendition of a disagreeable verdict. Such a verdict is considered by the law merely captious. With the consequences of your verdict you have nothing to do, further than this: That they should induce you to examine the testimony with the utmost care, and to exert, in the very best manner of which you are capable, the facilities of your minds to ascertain the truth, for you have but a single duty to perform, and this is to find the truth.”

To constitute murder in the first degree under our statute, the act must have been done “purposely and of deliberate and premeditated malice”—that is, of purpose with intent that the act by which the life of the party is taken should have the effect; “deliberately”—that is, with malice aforethought, and with “premeditation”—that is, the design must be formed before the act by which the effect is produced or perpetrated.

The atrocity of this offense consists in the deliberate and premeditated malice of the offender. Malice, in law, is the willfully formed design to do another an unlawful injury, whether such design be promoted by deliberate hatred or revenge, or by hope of gain, or springs from the wantonness and depravity of a heart regardless of social duty, and fatally bent upon

mischievous. Malice is said to be expressed when the cruel act is done with a sedate and deliberate mind, with settled and formed purpose. This kind of malice is generally evidenced by the circumstances preceding and attending the transaction complained of, as by threats, former grudges, laying in wait, concerted scheme to do injury, or by an unusual degree of cruelty attending the act. Malice is implied where the killing is sudden without any or great provocation, and also where the act done necessarily shows a depraved heart.

It is not merely an intent to kill that may exist without malice; nor does it mean mere passion, for the very existence of passion is often evidence that there was no malice. Passion is hasty, rash, following the first impulse of the moment; malice is cool, circumspect, slow, brooding, meditating, planning.

It is the duty and an obligation on the part of the state, under our system of the administration of criminal jurisprudence, to prove, by the facts and circumstances of the case, every and all the material allegations contained in the indictment, before asking a conviction at your hands.

A question as to the identity of the actor in this case has been raised by counsel. We look upon this question as one among the most important presented in the adjudication of this case. Hence you should examine the facts and circumstances proved by witnesses in this case with great care and caution, looking to the means of knowledge on the part of witnesses as to this point, and be satisfied from the same, beyond all reasonable doubt, as to the identity of the defendant.

I will now give you the following special charges handed me by Judge Johnson:

1. Where circumstantial evidence is relied on for a conviction, each circumstance forming a material link in the chain of testimony must be clearly and unequivocally established beyond all reasonable doubt.
2. The connection between the several links of the testimony must be established with equal clearness and certainty.
3. Where several witnesses have been examined as to the same fact, and those witnesses contradict each other, though the jury believe them all to be honest, such contradictions are proper to be considered in settling the question, whether their memories may be implicitly relied on. And also it is the duty of the jury to reconcile the testimony, as far as possible, consistent with the

truth. If they found substantial conflict of testimony, material to the issue, to compare and find out the truth. 4. Where the identity of the prisoner is a question involved, and witnesses swear to marks of identity which are proved not to exist, although every witness may be honest, such mistakes will be considered with reference to the question whether the witness' memory can be relied on. 5. Whatever reliance may be placed in the testimony of old acquaintances as to the personal identity of the prisoner, the testimony of a mere stranger, or one who had been but a casual observer, must be received with great caution—with large allowance for mistakes. 6. If there are reasonable grounds for an hypothesis, though that hypothesis be not clearly proved, that another person committed the crime, the prisoner must be acquitted. 7. The facts proved by circumstances should be so clear and satisfactory as to exclude every other reasonable hypothesis than the guilt of the prisoner.

And I will give you the following special charges, handed in by Judge Key :

1. That the jury cannot find the defendant guilty of murder unless they are satisfied, beyond all reasonable doubt, that he sent the instrument described in the indictment to Isaac Allison, and unless also the proof shows with moral certainty that the defendant thereby intended to kill Isaac Allison. 2. That whenever a jury entertains any reasonable doubt whether an offense is murder or manslaughter, it is their duty to find the defendant guilty of the lower offense. 3. That the sending of the instrument described in the indictment, to Isaac Allison, was an unlawful act, and if the jury are satisfied, beyond all reasonable doubt, that the defendant is the person who did send the instrument, the jury can only convict him of manslaughter, unless the proof show with moral certainty that the defendant intended thereby to cause the death of Isaac Allison.

And the following special charge handed in by Mr. Dickson :

The rule of law is, in civil cases, that a preponderance of probabilities entitles the party to whose favor the preponderance is to a verdict, has no application in criminal cases. There must be a moral certainty of guilt; and each circumstance essential to conviction must be fully proven, as if the whole case rested upon it. The rule of law is that the state relies upon a connecting chain to make out the whole—a single link wanting, the fabric must fail.

Gentlemen, you have exhibited a degree of patience during the nine days' tedious examination of this case that seems to us demanded at your hands in view of its importance. The case is a peculiar one in most, if not all, of its leading characteristics; in fact, it stands alone in the history of criminal jurisprudence.

A few words, gentlemen, as to what you must say in your verdict, and we are done. If you find the defendant not guilty, you will merely say so. But if you find him guilty, the statute requires you to specify in your verdict of what crime he is guilty. Therefore, if you come to the conclusion that he is guilty as alleged in the indictment, you will say: "We, the jury, find the defendant, William H. Arrison, guilty of murder in the first degree, as charged in the indictment": or words to this effect.

Gentlemen, you have solemnly sworn to well and truly try the issue between the state and the defendant, and a true verdict to give, according to the best of your skill and understanding. Of this we entertain no doubt. Take the case, give it a fair, candid and faithful consideration, and return such a verdict as the law and the evidence require at your hands. I now confide the case to you.

#### THE VERDICT AND SENTENCE.

At half-past two the *Jury* retired in charge of the Sheriff, and shortly after six it was announced that the *Jury* had agreed upon a verdict.

The *Clerk*. "Gentlemen of the jury, have you agreed upon a verdict?" The *Foreman*. "We have; we, the *Jury* in the case of the State of Ohio against William Arrison, find William Arrison *Guilty of Murder in the First Degree*, as he stands charged in the indictment."

December 22.

Argument upon the motion for a new trial was heard this afternoon.

*Mr. Dickson* stated that the ground upon which they asked for a new trial was, that newly-discovered testimony had come to light, and that the verdict was against the law, evidence and facts of the case. He submitted to the Court the following affidavit of one of the turnkeys of the jail:

On this 22d day of December, A. D. 1854, Archibald M. Garroatte, Turnkey in the Hamilton County Jail, being by me duly sworn, declares under oath that Gresham Somers, on, or about the

5th day of December, 1854, came into the Hamilton County Jail, where the above defendant was confined, and pointed out Alpheus W. Poage as the person who had delivered to him the box referred to in the indictment.

*Mr. Dickson* referred to discrepancies of the witnesses as to the identity of the defendant, the box and the card, and appealed to the Court, whether or not these discrepancies and contradictions did not establish a doubt as to the guilt of the prisoner.

*Mr. Pruden* declined arguing the motion, stating that the Court was familiar with all the circumstances and evidence of the case.

*Mr. Johnson* argued the question of identity at length, urging that it was not conclusively established by the carpenters that the prisoner had the box made, nor the testimony of True and Robinson satisfactory as to the identity of the person who had the card written; and, further, there was no evidence that the card produced in court was ever on the box which caused the explosion.

JUDGE FLINN took the case under advisement.

*December 23.*

JUDGE FLINN. The affidavit exhibited but a single naked fact, having no direct bearing upon the main points of the case, and therefore could not change the features of the crime. There has been no legal proof adduced to disturb the verdict of the jury, and, therefore, the Court will not set it aside, believing it to be given in truthfulness and honesty, after a protracted and careful examination of the case. The motion for a new trial is overruled.

JUDGE FLINN. William Arrison, you were indicted by the Grand Jury, under the first section of the Crimes Act, for the murder of Isaac Allison. The case was submitted to a jury of your countrymen, and after a patient deliberation, a verdict of guilty was rendered. Have you anything to say why the Court should not now proceed to sentence you?

*The Prisoner.* There are some things I feel need to be said, but whether they would avail me now, I cannot say. I fondly

hoped to get a new trial, in order to have time to prove my innocence. I presume it is not the intention in this Hamilton county, to put a man to death without giving him time to show his innocence, although it is almost the same thing as death to be confined in the jail. Time to the guilty only goes to confirm their guilt. I am confident that if I had time, there are things that could be brought to light that would prove my innocence, notwithstanding the beautiful network of testimony that surrounds me. I did not think until after the trial that it would be of use to me to prove where I was on the Sunday and Monday before the explosion. If I had time, I think I could prove where I was. There is another circumstance: When McCullough came to the jail to identify me, he says I was standing near the stove. I will state here that I never attempted to keep myself from being seen by any person who was brought to the jail. I was on the platform when McCullough visited the jail. But this may be of no importance in the case. There are other things I flatter myself that I could substantiate. I could prove that I never gave the box to the boys; but whether this would be important or not, I cannot say; but it would prove that one link in this beautiful chain was broken. There are other things I could prove, but, as I before said, I have not had time. I have nothing more to say.

JUDGE FLINN. William Arrison, it is the sentence of the Court that you be taken from hence to the jail of Hamilton county, by the Sheriff, and therein confined until the eleventh day of May, 1855, and upon that day, between the hours of 10 o'clock in the morning and 4 o'clock in the afternoon, you be taken to the place of execution by the Sheriff, and be then and there hanged by the neck until you are dead.<sup>a</sup>

<sup>a</sup> Arrison was not hanged. He was granted a new trial which resulted in a penitentiary sentence. He served a number of years, and was finally released, and disappeared.

## THE TRIAL OF THOMAS MAULE FOR SLANDER AND BLASPHEMY, MASSACHUSETTS, 1696.

### THE NARRATIVE.

For many years after the prosecutions of the Quakers in Massachusetts had ceased<sup>1</sup> and after the harsh laws against them had been repealed, the sect continued to be unpopular, and its members were regarded as dangerous intruders. They on the other hand were equally as bold and as noisy in their meetings and speeches as when they first arrived in the colony.

Among those who rendered themselves particularly obnoxious on this account, was Thomas Maule, of Salem, a man of great influence among the Quakers. By profession a merchant, he possessed great energy of character united with considerable wit, acute reasoning powers, and a ready eloquence. He was several times severely punished for his opinions, and as early as 1669 was sentenced to be given ten stripes, for saying that Mr. Higginson, the minister of Salem, preached lies, and that his instruction was the doctrine of devils. In 1695 he published a book entitled the "Truth Set Forth," in which he gave a particular account of "God's judgments upon the persecuting priests and rulers;" and among them he placed the Salem Witchcraft,<sup>1a</sup> which he commented upon in a style of cool and cutting sarcasm that could scarcely be borne with patience by those in authority, who were very sensitive upon that subject.

Maule was accordingly arrested by order of the council; his house was searched, and all the books that were found were destroyed. When brought before the governor and

<sup>1</sup> See 1 Am. St. Tr. 813.

<sup>1a</sup> See 1 Am. St. Tr. 523.

council in Boston, he refused to answer any questions and demanded to be tried in his own county by a jury of his equals. He was then dismissed on heavy bail, and, at the court at Salem in September, 1696, he was charged with slander and blasphemy. Maule defended himself with vigor and the jury acquitted him. The judges were not pleased, and demanded of the jury how they could return such a verdict with the book before them. They replied that this was not sufficient evidence, as Maule's name was placed on it by the printer, and they added that they were not a jury of divines to decide whether the opinions were right or wrong.<sup>2</sup>

### THE TRIAL.<sup>3</sup>

*In the Supreme Court of Judicature of the Province of Massachusetts, Salem, September, 1696.*

THOMAS DANFORTH,	}	<i>Judges.</i>
ELISHA COOKE,		
SAMUEL SEWALL, <sup>4</sup>		

*September 17.*

The grand jury made the following presentment against the prisoner: "At a superior court held in Salem, for our sovereign lord the king, in the county of Essex, in the province of the Massachusetts Bay in New England, the tenth day of the ninth month, 1696, the grand jury do present Thomas Maule, of Salem, shopkeeper, for publishing or

<sup>2</sup> Chandler Crim. Tr., p. 148. See 1 Am. St. Tr. 116.

<sup>3</sup> *Bibliography.* \*"Chandler's American Trials." See 1 Am. St. Tr. 116. The report is compiled from a rare work entitled, "Persecutors Maul'd with their Own Weapons," one copy of which is contained in the library of the Massachusetts Historical Society. The title page is gone, but the work appears to have been published soon after the trial, in 1696. The book purports to have been written by "Tho. Philathes," but is probably the production of Maule himself. From an examination of the state and court records, the general statements of the author appear to be correct, although the narrative is undoubtedly highly colored.

<sup>4</sup> See 1 Am. St. Tr. 522.



putting forth a book entitled, "Truth held forth and maintained," wherein is contained divers slanders against the churches and government of this province; and for saying at the honorable court at Ipswich, in May last, that there was as great mistakes in the scriptures as in his book."

The *Prisoner* pleaded *Not Guilty*.

*Anthony Checkley*,<sup>5</sup> King's Attorney, for the Prosecution.

*Dr. Benjamin Bullivant*, for the Prisoner.

*Dr. Bullivant* put in a plea to the sufficiency of the presentment, alleging that the matters contained in it were too general and uncertain; that neither county, year or day were mentioned; that it was not laid upon oath; that the king's name was not mentioned; that if it were true the defendant said that there were as many mistakes in the scriptures as in his book, this was not punishable, the presentment not alleging that they were the holy scripture or word of God, there being profane as well as sacred scriptures, and he might have referred to the former.

*Mr. Checkley*, the King's Attorney, replied and the plea was overruled by the Court. The *Prisoner*, then put upon his defense, addressed the Court in his own behalf.

*Maule*. You who have set yourselves to be judges in this case against me, as you are invested with magisterial power, I respect you; but wherein you assume to yourselves the power of the Bishops' Court, as in this case, I no more value you than I do Jack Straw. If you would approve yourselves wise men, you ought to amend the many rents you have already made by the mismanagement of the trust committed to your charge. If you are resolved to make a rod for me, see that it be light for the more care of your own that is to come, for it is said by Him that cannot lie: "the same measure that men make, the same shall be made to them again." If your power continues long, he that now enjoys a good estate

<sup>5</sup> He was a Boston merchant and appears by the records to have been a party litigant to several suits while he was attorney general. He appeared for the king in the Witch Prosecutions. See 1 Am. St. Tr. 523.

under your government, seven years hence may not be left worth a groat. You are set to watch over the people, but things have come to such a pass by your means, that they have greater need to watch over you.

JUSTICE DANFORTH. Gentlemen of the Jury: Having taken a solemn oath to do the thing that is right in the sight of God as near as you can; you ought well to consider the horrid wickedness of Thomas Maule's setting forth the book now before you, in which there is contained a great deal of blasphemous matter against the churches and government of this province. You well know, that when the husbandman hath taken great care and labor to fence in his field of wheat, and there comes a ravenous creature and makes a gap through the fence for other like creatures to go through and spoil the corn, and to trample down and lay waste the husbandman's field, he will use his utmost endeavor to destroy such a ravenous creature. How much more are we to preserve the hedge of that good Husbandman, with which He hath, by His ordinances, and good government, fenced and hedged His churches and people in this province! But this work of Thomas Maule wholly tends to overthrow all good in church and commonwealth, which God has planted amongst His people in this province. The cause and the book is now committed to your hands, to perform your duty relative to the same as God shall enable you.

*Maule.* Jurymen, look well to the work which you are now about to do. The case is committed to you, who are to be governed by the king's law. No part of that law have I broken. The book is no evidence in law against me, further than you are satisfied that I have written anything contrary to sound doctrine and inconsistent with the holy scriptures. If you favor any of the unjust charges of the judges against me, and say there is such matter in the book as they charge me with, you must go to the printer for satisfaction, for I am ignorant of any such matter in the book. My hand is only to my copy, which is in the hands of the printer in another government, and my name in the printed book does not in law prove the

same to be Thomas Maule, any more than the spectre evidence is in law sufficient to prove a person accused by such evidence to be a witch. Look well, therefore to your work, for you have sworn true trial to make and just verdict to give. If you do me injustice the fault will be your own, for these my accusers on the bench are but as clerks to say "amen" to what you do.

The *Jury* soon returned a verdict of *Not Guilty*.

The COURT, after expressing much dissatisfaction at the result, asked the *Jury* how they could return such a verdict with the book before them.

The *Jury*. The book was not sufficient evidence, for Thomas Maule's name was placed there by the printer. And the matter contained in it was not cognizable by us. A case like this required the wisdom and learning of a jury of divines.

JUSTICE DANFORTH. Thomas Maule may escape the hands of men, but he has not escaped the hand of God, who will find out all his evils and blasphemies against His church and people; and has reserved him for further judgment.

*Maule*. I am in no way guilty of your charge, but have great cause to praise God for my deliverance by the jury who are made instruments of freeing me out of the hands of them who have manifested their unrighteous works against the people of God and the king's subjects, as their fathers did before them.

JUSTICE DANFORTH. Take him away; take him away.

The *Prisoner* was then discharged.<sup>6</sup>

<sup>6</sup> The record of the case is thus made up. "Thomas Maule of Salem, shopkeeper, indicted by the grand jurors of our sovereign lord the king, upon their oaths, for publishing, or putting forth, a book entitled 'Truth held forth and maintained,' wherein is contained divers slanders against the government and churches of this province, as set out in the indictment, and being arraigned, pleaded not guilty, and for trial put himself on the country; and a jury being accordingly impanelled and sworn, John Turner, foreman (no exception being made), and the indictment read, and pleas fully heard, the jury went forth and returned, bringing in their verdict, viz.: They find the defendant not guilty according to indictment."

## THE TRIAL OF EMMA AUGUSTA CUNNINGHAM FOR THE MURDER OF DR. HARVEY BURDELL, NEW YORK CITY, 1857.

### THE NARRATIVE.

Dr. Harvey Burdell, a physician, forty-six years of age, who had devoted most of his life to dentistry and had attained great eminence as a dentist—a man of intelligence and culture—was, on the night of the 30th of January, 1857, foully murdered in his office, in a house owned by him and in which he resided, in the city of New York. His office boy, when he arrived at half past eight the next morning, upon entering the doctor's office, found him, surrounded with blood, lying on his face close to the door. Greatly frightened, he informed the inmates of the house, who all appeared surprised and horrified at his tale. At first it was thought that Dr. Burdell had committed suicide, but it was soon ascertained that he had been assassinated. There had been inflicted upon him, by a dirk or sharp instrument, fifteen or more wounds, almost any one of which would have been fatal. He was stabbed through the heart and the carotid artery was severed. The inmates of the house were: Mrs. Emma Augusta Cunningham, supposed to be a widow; her daughters, Augusta and Helen, about eighteen and sixteen years of age, respectively, and her two sons, ten and nine years old; George V. Snodgrass, a young man of about twenty years, a son of the Rev. Dr. Snodgrass, a Presbyterian clergyman of note; Hon. Daniel Ullmann, a lawyer, who had recently been a candidate for Governor of the State of New York; John J. Eckel, a lodger in the house, who was in the employ of Smith Ely, afterwards State Senator, Member of Congress, and Mayor of the City of New York; and two servant girls.

The murder must have occurred after the inmates of the house retired for the night, but they all denied that they had heard anything unusual. The condition of the room when the body was found, and the number of wounds upon it, showed that the struggle between the murderer and his victim had been long and fierce.

Dr. Burdell did not take his meals in his house, but boarded at the Metropolitan Hotel on Broadway. He was seen on the street near his house about half past nine on the night of the murder, but between this time and when he left the house for dinner, about five o'clock, no witness spoke of having seen him. Nothing appeared in the evidence as to his whereabouts after this time until the discovery of the murder next morning.

Mrs. Cunningham and Dr. Burdell had been very friendly and it was at his solicitation that she had made her home in his house, rented all of it but his office and carried on a boarding-house there. But some months before, the relations between them had been disturbed; there were lawsuits, one was for breach of promise of marriage, another for slander, for he had accused her of stealing some of his securities, which he kept in a safe in his room. These, however, had been settled, and a release of all claims had been drawn up and executed.

The Coroner's Jury, after a long investigation, charged Mrs. Cunningham and Eckel with the murder and Snodgrass and Mrs. Cunningham's two daughters with being accessories. While the inquest was in progress, the heirs of Dr. Burdell applied for administration of the estate, whereupon the public was startled by the claim set up by Mrs. Cunningham that she had been married to the doctor only some days after the suits against him had been settled. The heirs denied this, and the trial of this issue began at once before Surrogate Bradford,<sup>1</sup> the leading counsel for the heirs being

<sup>1</sup> BRADFORD, ALEXANDER WARFIELD. (1815-1867.) Born Albany, N. Y. Lawyer, jurist, author, edited *American Antiquities*, a number of volumes of reports. Surrogate of the City and County of New York for many years.

no less a person than Samuel J. Tilden,<sup>2</sup> then at the head of his profession in New York City.

Mrs. Cunningham claimed that the marriage was a secret one and was kept so at the request of Dr. Burdell. She produced a certificate signed by Rev. Uriah Marvine of the Dutch Reformed Church, and her daughter Augusta swore that she accompanied the two as their only witness. But the clergyman was not positive as to the identity of the doctor, and the certificate was defective. The heirs claimed that Ecker had personated the doctor at the clergyman's house, and they brought many witnesses to prove that the doctor was not in the city on the day of the alleged marriage. Meanwhile Mrs. Cunningham had been indicted for the murder, and, the trial coming on, the case before the Surrogate was adjourned to await its issue.

The trial of Mrs. Cunningham for murder occupied five days, a large number of witnesses testified both for the state and defense, but, the evidence being all purely circumstantial and there being no direct proof to show that Mrs. Cunningham had committed the murder, the jury gave her the benefit of the doubt and returned a verdict of not guilty.

The proceedings in the Surrogate Court were now resumed. The evidence on both sides had all been submitted, the lawyers had made their arguments and the Judge was considering his decision when a new sensation was sprung upon the city and its inhabitants. A few days after the case before the Surrogate was closed, Dr. Uhl was sent for by Mrs. Cunningham. Dr. Uhl had been her medical adviser previous to the murder, had attended her during the inquest, and was a prominent witness at the Coroner's inquest and at both trials.<sup>3</sup> He accordingly went to see her, and was by her informed that she was *enciente* by Dr. Burdell and expected to be confined shortly. She asked him to become

<sup>2</sup> TILDEN, SAMUEL JONES. (1814-1886.) Born New Lebanon, N. Y. Leader of New York Bar; member State Legislature 1846 and 1870. Governor of New York 1875. Defeated for President of the United States by Rutherford B. Hayes 1876.

<sup>3</sup> See *post*, p. 130.

one of her medical attendants, and Dr. Uhl consented. In a few days he called again and advised with her about her condition. Upon pressing some medical inquiries, his suspicions became aroused. He visited her again, and his doubts became almost certainties. He immediately laid the matter before District Attorney Hall, who advised him that, while he had it in his power to frustrate the attempted crime, under the strange circumstances surrounding this woman, and her world-wide notoriety, and the unfortunate results which might flow to the community if her crimes should baffle detection, it was his duty to do all in his power to thoroughly expose her. Dr. Uhl consented to go on, and, concealing his doubts and suspicions, learn from Mrs. Cunningham, all her schemes and arrangements. In the next interview she admitted to him that the approaching confinement was a humbug, and offered him one thousand dollars if he would undertake the job of providing a child. Dr. Uhl apparently assented, obtained a babe from a nearby hospital, took it to Mrs. Cunningham, who gave out that it was the child of herself and Dr. Burdell. The fraud was at once exposed; Mrs. Cunningham was arrested and sent to jail without bail, her two leading counsel, Messrs. Clinton and Dean, refusing to appear for her in the bogus baby case. And on August 24th, while the claimant was incarcerated in the Tombs, the Surrogate rendered his decision, holding that Dr. Burdell was never married to her, and refusing to issue to her letters of administration.<sup>4</sup>

#### THE TRIAL.<sup>5</sup>

*In the Court of Oyer and Terminer, New York City, May, 1857.*

HON. HENRY E. DAVIES,<sup>6</sup> *Judge.*

*May 4.*

The prisoner having been previously indicted by a Grand Jury for the murder of Dr. Harvey Burdell, by stabbing,

<sup>4</sup> Bradf. 454.

<sup>5</sup> *Bibliography.* \**"Parker's Criminal Reports,"* see 4 Am. St. Tr. 88.

\**"Surrogate's Court. The Burdell Case. Closing argument of Mr. Charles Edwards, advocate for next of kin of Harvey*



pleaded not guilty. Out of a panel of five hundred jurors, most of whom were challenged for cause or to the favor, the following jury was obtained and sworn: Gilbert Oakley, Chauncey L. Norton, Francis K. Gehagan, William D. Lockwood, Charles F. Hunter, Luke C. Coe, John Green, George Tugnot, David W. Doughty, Frederick A. Gaetz, John Archibald, and Gilbert W. Barnes.

*Stephen B. Cushing*,<sup>7</sup> Attorney General; *A. Oakey Hall*,<sup>8</sup> District Attorney, and *Charles Edwards*,<sup>9</sup> for the People.

Burdell, and in opposition to the claim of Emma Augusta Cunningham for letters of administration. New York: John S. Voorhies, Publisher and Law Bookseller, 20 Nassau St. William C. Bryant & Co., Printers, 41 Nassau St., Cor. Liberty. 1857."

\*"Bradford's Surrogate Reports.

"Celebrated Trials, by Henry Lauren Clinton, author of Extraordinary Cases, with nine portraits. New York and London: Harper & Brothers, Publishers. 1877."

<sup>6</sup> DAVIES, HENRY EBENEZER. (1805-1881.) Born Black Lake, N. Y. Went to Canandaigua, N. Y., at age of 14 and became member of family of Judge Conkling, with whom he studied law. Admitted to Bar 1826. Began practice in Buffalo, but removed to New York City in 1830. Partner first with Judge Samuel A. Foote until 1840, then partner of William Kent (see 1 Am. St. Tr. 457), son of Chancellor Kent. Member Common Council N. Y. City 1840. Corporation Counsel 1850. Justice Supreme Court 1855. Justice Court of Appeals 1860-1869, being Chief Justice for several years. Afterwards partner with Judge Noah Davis until 1872, and then with his son until his death. Counsel and Trustee Mutual Life Ins. Co. Receiver of Erie Railroad 1861. Counsel Merchants Exchange Bank. Dean Law Department College of City of New York 1870-1881. President Deaf and Dumb Institution. Confidential adviser of President Fillmore, whom he accompanied abroad in 1855. See Nat. Cyc. Am. Biog. App. Cyc. Hist. Bench and Bar of New York.

<sup>7</sup> CUSHING, STEPHEN BOOTH. (1812-1868.) Born Pawling, N. Y. Graduated Williams College 1832. Member New York Assembly (Tompkins Co.) 1852. Attorney General of New York 1855-1857. Died in New York City. See Williams College Gen. Cat. Cushing (Jas. S.), The Cushing Family, 1905.

<sup>8</sup> HALL, ABRAHAM OAKEY. (1826-1898.) Born at Albany, N. Y. Prominent Tammany politician and lawyer. Mayor of New York 1869-1870. Later became a journalist; was on the staff of the New York World and lived in Europe for many years. Author of Stories and Ballads.

<sup>9</sup> EDWARDS, CHARLES. (1797-1868.) Born in England. Practiced law in New York City for many years and was Counsel to



*Henry L. Clinton,*<sup>10</sup> *Gilbert Dean,*<sup>11</sup> *William R. Stafford,*<sup>12</sup> *Theodore Romeyn*<sup>13</sup> and *B. C. Thayer,*<sup>14</sup> for the prisoner.

*May 5.*

*Mr. Hall.* May it please the Court and Gentlemen of the Jury: The duty is assigned to me by the prosecution of preparing, in the usual legal way, your minds to receive the evidence which the prosecution, under the rules of law, will offer in support of the indictment upon which this defendant at the bar was yesterday arraigned. The prosecution proposes to prove by the testimony, which it deems, in its chain of progression, though formed of small, and to some extent delicate, links, a perfect chain of mental conviction; we propose to prove that one of your late fellow-citizens, Dr. Harvey Burdell, whose dying moments were with the dying moments of the first month of this year, for towards

British Consulate; author of many law books, also "History and Poetry of Finger-Rings," "Pleasantries about Courts and Lawyers."

<sup>10</sup> CLINTON, HENRY LAUREN. (1820-1899.) Born Woodbridge, Conn. Noted criminal lawyer of New York City. Author of "Celebrated Trials" and "Extraordinary Cases."

<sup>11</sup> DEAN, GILBERT. (1819-1870.) Born Pleasant Valley, N. Y. Representative in Congress 1851-1855; Judge Supreme Court 1855-1857; member firm Beebe, Dean & Donohue, New York City; member State Assembly 1862.

<sup>12</sup> STAFFORD, WILLIAM R. Practiced law New York City 1848-1866. See N. Y. City Directories.

<sup>13</sup> ROMEYN, THÉODORE. (1810-1885.) Born Hackensack, N. J., of Dutch lineage. Family distinguished in the religious and political history of the state. Educated at Rutgers College. Studied law first with Peter V. Vroom (Governor and Chancellor of New Jersey and Minister to Berlin), then with Samuel L. Southard, Secretary of the Navy in Cabinet of John Quincy Adams, and last with Benjamin F. Butler at Albany, N. Y. Admitted to Bar 1835. Removed to Detroit, Mich., 1835. In 1848 began practice in Brooklyn, N. Y., but returned to Detroit in 1858 and continued in practice there until his death. A Jackson Democrat. Noted for his thoroughness in preparation of cases; a literary, scientific and political scholar, and one of the foremost lawyers of Michigan. See American Bar Assn. Reports, 1885.

<sup>14</sup> THAYER, BENJAMIN C. Practiced law in New York City 1853-1885. See N. Y. City Directories.

midnight on the last day of January he ceased to be your fellow-citizen—but to you, as jurors, his memory survives—we propose to prove that this gentleman was murdered with malice aforethought; that he was murdered in his own house, surrounded by the sanctity of his own home; that the deed was premeditated; that all the circumstances show that; that it was a deed which shows upon its very impression the marks of a dreadful hate, a revenge for some injury unatoned for in a mortal consciousness; that, by the circumstances, someone in that house, which was his house, did the deed; that there is a total exclusion of every person in the world from the circumstances of the case; that among the inmates of that house was one who, more than any other person in the world, had the motive, with malice aforethought, to premeditate and accomplish that horrible deed; that that person was a woman—was this defendant; and that clustering around all these circumstances is the irresistible mental conviction that that deed was the deed of a woman—a deed to a great extent unartificial—a deed planned and contemplated from a different standpoint from which men of the world contemplate crime, perpetrated to a great extent with that ignorance of human nature which, compared with men of the world, woman at all times in history have possessed and at all times in our own history claim. You will perceive that there is an instant distribution here of the persons—the dead and the murderer—to the circumstances clustering round them both. You will confine your attention to two parts of this whole case—that part which relates to the persons, and that part which relates to the circumstances. And who was the person? A citizen against whom no reproach had been raised—a citizen who was said to have enemies, but, so far as the prosecution have been able to extend their investigations, who had no enemy, whom you can call an enemy, but this woman.

It surely needs no words of mine to recall to each of you the sensations and the convictions which filled your breasts, when, in the morning, at your breakfast-tables, you read of

this horrible deed. It needs no feeble words of mine to bring before you the feelings which you, as fellow-citizens, had regarding the effect of such a crime upon the world at large if it were undiscovered and unavenged, in the language of the law, by the speedy and the retributive arm of justice. When you stole to your homes at night, glancing up at the little lights in the streets, as if some fell and dark shadow of death was upon your path; when, as you closed your door and bedroom window, you looked to see if, peradventure, the shaft of the inevitable destroyer were there in the hand of some murderer, the hand of some unknown enemy of yours. No, gentlemen! I recognize each one of you as a citizen of a metropolis to whom circumstances of this kind have become familiar and household reflections.

He is dead, and the cold word of charity may say, "Let his memory be forgotten;" and she who was his deadly enemy in life lives, and, as yesterday upon that stand, as witnesses regarding your own purity, your own integrity, and your unconsciousness of bias or prejudice towards her, as she challenged you in the language of the law, so today, as she sits there—a veiled picture of sorrow, as the world would say—she challenges you today as jurors by her looks, demanding the sympathy which belongs, not to a murderess, but to a woman; and day by day, as you are to sit here in the discharge of a solemn public duty, she will continue to challenge your sympathy; and eloquence and ingenuity will come to her aid, and at every step of this testimony the thought will be forced upon your minds by that eloquence: "Remember, gentlemen, you are trying a woman." We appreciate fully the difficulties which the prosecution labor under from the outset, but in the discharge of our duty we shall mince no words before you, gentlemen. Crime has no sex; crime has no peculiar attribute of its own; no differences, when it settles, in the one breast of the man, or the other breast of the woman. You are not here to judge the woman, but the crime; you are not here to pronounce alone upon the woman, but upon the person who is named in the indictment. Oh! it is

no wonder that all these holy associations that cluster around the name of woman should force themselves into the jury-box when a case of this kind comes before the public eye. When we remember the mother of our prayers, when we remember the sister of our household adoration, when we remember the wife of our life until death, when we remember the children who are to be the future women of the world, that sit upon our knee, and we feel as we look upon young girlhood and growing maidenhood, we say, can it ever be that this being, upon whom God Almighty has put his own seal of purity, should ever live to be the perpetrator of crime, the midnight assassin, to cherish hate and revenge and jealousy? And yet, when we open the book of history, we are forced to come to the conviction that crime knows no sex. While in our earliest studies of Romish history we read of her who, having murdered her husband, the servant of Imperial Rome, drove her chariot over the dead body of her father; and in the time of Imperial Rome the name of Messalina has become an historical word; and Fulvia, when the head of Cicero was brought to her, she spat upon it, drew from her bosom, which had nourished children, a bodkin, and drove it through the tongue until it quivered; and the same dramatist who speaks about the wife of William Tell will speak of her who forswore the very maidenhood purity of her name—Agnes, Queen of Hungary, who bathed her feet in the blood of sixty-three knights, and said, “It seems as if I were wading in May dew;” and the same evangelist who speaks of her who was last at the cross and first at the grave tells us in the same gospel of her who bore upon a charger the head of her deadly enemy, the forerunner of Him who was the Savior of the world—

. . . “I was a woman once,  
A thing to nourish children at my breasts,  
And hear their angel-whispers in my dreams.  
But now, with sorer travail, deeds of wrath  
And ghastly horrors take their birth from me.”

Remember the relationship which existed between the gentle and the loving Cordelia and the infamous Regan and Gon-

eril; and the same hand who drew Rosalind, Cecilia, and Beatrice has handed down to immortality—for there is an immortality of infamy—the infamy of that Lady Macbeth, a prototype of just such a woman as this defendant. I deem it my duty to call up this woman, and to adjure you to remember that there may be sometimes only so much of a woman as will be left in the body; but the mind, the immortal mind, is that original immortal mind that became the original fiend. All through life, since she knew him, she pursued him with a fiendish hate, jealousy, and a fiendish revenge, until the knife of this woman-fiend found its unholy repose in the heart of him whom she thought to have made her own. Deem not, then, that I am wasting your time; deem not that, as pausing in the testimony, I make these references. The prosecution labor under this disability of sympathy. We call upon you, as reflectors of history, as acquainted with human nature, as able to lay out of your minds all your previous sympathies, to look upon the deed which we shall translate before you in the evidence from the witness-box as a simple deed of malicious, horrible, revengeful crime. She had known him three years, and she said he was the father of a child who never saw the light. She was his mistress, though she claimed to be his wife; and if I shall show by this testimony to you that she deserves, from her own words, no sympathy, no respect, then, to that extent, I have done my duty. And I challenge you, in all this testimony, and I challenge the eloquence of my learned friends upon the other side, to find in this evidence one iota of testimony which shall show her to be other than I have described her by reference to history and the testimony. She was jealous of him; she haunted and hunted him upstairs and downstairs, in his privacy and publicity; she was in this world that picture of remorse to the man—if remorse he could have—when thinking of his acquaintanceship with her, while, if he died, the fate of an unbeliever awaited him. The very domestics will take the roof of that house off and let you look into the depth of moral degradation which clustered around this woman. Why, in olden times, the moment you started with

a woman who, in a house with her own daughters, had prostituted herself in crime, would fitly go beside that person—that woman in form, though fiend in mind. And the domestics will tell you how she hunted and haunted him. Police officers we shall bring to you, that came from the street at his bidding to settle the quarrels that clustered around him. A police officer who came there in September and saw this woman strike him; other officers who came in later, who heard her asseverate that she was his wife by every tie on earth—morally perhaps she was, and morally perhaps she is; and even their quarrels were forced upon the public through the lynx eyes of these policemen who were called in. And there was litigation between them. She sued him, claiming that there had been a breach of promise of marriage, and that there had been seduction. Those suits were dated in October, and the quarrel comes down to the very night of this occurrence, when she followed him to the door with the dreadful threat upon her lips, which we shall show to you. Those suits were settled, and most extraordinary papers were drawn up and signed by him—this hunted, haunted man, by this fiend in human shape—papers which you would shrink from—which you would not sign, unless you were convinced that she who commanded it was your mortal enemy, unless you had upon your soul the dreadful presentiment which was upon him.

And they came to the house of an intimate friend of the family, Dr. Thompson, and forced their quarrels upon him, she following him into the house, as the doctor will tell you. She, with the sly cunning of her sex, took domestics into the room next door to his, saying to them: “Now, listen to the words that occupy the time between the doctor and myself.” Her spies, she thought! Ah! not so, thou artful woman! The spies of justice, who will be here today to tell what passed between you and that dead man—to tell what passed between them—words so loathing that even the domestics shrank in horror back to the kitchen, to remember well for future use what they had heard.

And there came to the house one day he who sits in Court—a man that neither you nor I would quarrel with. The greedy, lustful eyes of this woman fiend were fastened upon him, and by the evidence in this case—irresistible, and not to be confuted—he became, in one story, the counterpart of him who had been her paramour on the story below. And she did love him—she did love him, this man Eckel; and she, the mother of daughters who were themselves candidates for marriage, fastened her greedy, lustful eyes upon him.

I have nothing now to say of him. Let him be taken care of hereafter. But this we must not forget in this case, as step by step there is progression, that whether she was the wife of the murdered man or his former mistress, in either case she was alike guilty of the grossest infidelity in her conduct with him who occupied the apartment adjoining her own. He had made up his mind that life to him was useless so long as he had this shadow at his side, and he had made up his mind to let that house, of which she was the tenant and he the landlord, to another person. And she heard of it. She saw that which was going on, and, gentlemen, on the very night before the murder, the very respectable lady who was to have become the tenant of that house for the year commencing last Friday was going through the house, meeting the servants, and, seeing her going out, she still, though he was absent, pursuing him, comes down before one of these domestics and says: “Hannah” (which was the name of the cook), “what was that woman doing here?”

“‘Why, madam, she was looking through the house.’

“‘Is she going to take this house?’

“‘Yes, they’ve been looking all around in the kitchen.’

“‘Is Dr. Burdell going to let this house to her?’

“‘Yes; it looks so.’”

Then she said—and the woman of the world would not have said what fell from her lips—“Before tomorrow morning he shall be a corpse,” or “He may be a corpse;” and on that very morning she had said to the boy that the doctor was a very passionate man and might not live another day; and on



this very Friday—this superstitious day, the day before the day which was to turn her out of the house and to put this other person in there—on that very night the deed was done. On the very day that this newly found tenant had come to inspect the house, the murder is done. The doctor was a regular man. His outgoings and incomings were regular. She had watched them. She knew them. But there was a highly honorable man who had no part or parcel in that household, who lived in the third story—he who, occupied with professional and public cares, had little knowledge of the infamy that clustered around him. She went to him on this very Friday as he was going out, and, by inquiring about his fire, gained from him the knowledge that it would be midnight before he returned; and in the hearing of Dr. Thompson—in his hearing she says to Dr. Burdell: “What time will you return tonight?”

Her own household she could take care of. There was her paramour, whose interests were subservient to hers. There were her daughters whom we would not, except in a court of justice, accuse of a misprision of treason in trying to shield their mother. There was a boy, young in years, it is true, but at the same time as artful a boy as you ever set your eyes upon. There was the cook, who, wearied by the toils of the day, would sink away into profound forgetfulness as soon as her head touched the pillow. There were the little boys, who slept in the innocence of childhood. Why, gentlemen, in the whole annals of murder you will never find an opportunity so carefully provided for as the opportunity given by this woman on this night to murder her enemy. The upstairs lodger out for all night; the exact time given from his own lips when he was to return; her family to be taken care of—but, ah, the cook! One domestic had gone; there was only one left in the house, and she must be got out of the way. “Oh!” said this lying woman on the stand—and the discrepancy is enormous; the very hand of Providence is in this incident—this lying woman, on the stand, said: “I rang the bell for the cook to come up into the parlor, and the cook came up



into the parlor and received her orders for the next day, and I dismissed her to bed." Why! see what the cook will say when she comes upon the stand: "Mistress, you came down into the kitchen with this paramour of yours, and—a thing you had seldom done before—you ordered me to bed, although you knew I was the only servant in the house, and had a double duty to perform." And so, on this Friday night—the lodger out, the cook sent upstairs to bed, the family disposed of—she has this deed ready. She has once stolen his safe-key; she has once stolen his pistol; she has a dagger of her own—and everything is ready for his coming; and she who had always haunted and hunted him, as you will remember on the testimony when it comes to be offered before you—I pray your attention to that—who had watched him on Friday, who had watched his conversation with Dr. Cox—who will be upon the stand—and with Dr. Blaisdell—who will also be upon the stand—was watching for his coming.

Now, we shall show to you that the situation of that house utterly excluded the interference of any outside person; we shall show you that when the boy came there in the morning the basement door was locked, and when he went out of the yard the egress there had been shut off; and on the front door was one of the most wonderful locks that can be found anywhere. Three of the latch-keys he had in his pocket, one was in Mrs. Cunningham's possession, another was in Snodgrass's, another in the lodger's, another with Eckel—making the whole set and none missing. And when he came, there was following in his steps—they may say—some enemy, who could have stabbed him to the heart, and run less risk of detection in escaping from the house, with bloody garments and a trail behind him. He comes in alone; his apartments are entirely secluded and locked up; she has the pass-key, and she alone, to the front room where his bedroom was. He has the key of his back room in his bag; he puts it in the door; he opens it; he goes in. The shawl was found folded on the sofa and the cap carefully disposed of. In the dark he is supposed to fold his shawl; he is supposed, on the theory

which they offer, to put away his own cap, and his shoes flung off in an instant before the fire, before the gas was lighted. And, gentlemen, the physicians will tell you that which contradicts popular ideas upon this subject—if it is correct to speak of popular ideas as matters of history clustering around this case—that every particle of mortal injury which was done to that man was done in the briefest possible space of time. Wherever struck, which is for you to find out hereafter from the testimony, whether in a sitting posture by the fire, taking off his shoes, whether in throwing off his shawl, by someone who met him at the door, who had a pass-key, and who had entrance, and who could wait for him; but whether struck there or here, this one damning fact will come out, that whoever struck that blow was probably a left-handed woman; and she, left-handed, carefully watched in the prison to see it, and the domestics of the family swearing so.

I shall have a model, perhaps, this afternoon, full and entire, and will give you a complete entrance to all the localities of this catastrophe. But this I may say, that by the door to which by his natural instincts he would rush, by the door in the corner, someone behind him gave him a blow in the left side of the neck, and there is the life-spout on the door. The wounded animal turns, the hunter tells you, in a direction from the blow; it is so with a man; he turns, and only one kind of blow could have been given; that is the left-handed blow—not downward but upward—in the heart. In fifteen seconds he staggers a few steps and falls—a dead man. Oh! says my learned friend, we insist that this was not a premeditated murder; it might have been justifiable; it might have been excusable homicide; it might have been manslaughter. It would be hardly fair in me, perhaps, to say, or to ask, was that idea the faintest reflection of a client's confession? and I shall not; but I will ask him in his candor and fairness, as the counsel before the jury, to say where are the circumstances and the marks which show upon that murdered man's body anything that would excuse, anything that would justify, anything that would show the blows of mere spasmodic

passion, which in the cooling of time would bring the hour of remorse. No, gentlemen; fifteen wounds upon that body speak—the wound in the neck, the two in the heart, the wound over the right shoulder, the wound in the wrist, the three wounds in this arm, the wound in the abdomen, another wound in the right side of the neck—speak not of blows of spasmodic, temporary passion, for cooling time to bring regret—speak not of the blow of self-defense against some sudden attack which the law would place in the category of justifiable and excusable homicide. They show the blows of revenge, hatred, and malice, that, even when the man was dead, and the life-tide flowing rapidly from his heart, and his soul gone to his last account, could again and again place the stab upon the senseless corpse, to make assurance doubly sure, to render it a thing of certainty that her enemy had gone, that this discarded paramour, this victim of jealousy, of hate, and revenge, this victim who had dared to make an appointment for the next morning to set his hand to paper to bargain away her rights of property and her home, this victim who died in fulfillment of bloody threats that had not yet cooled away from her lips; whoever did that deed was in all probability covered from head to foot with blood; blood upon the dead walls; blood upon the dead doors; blood upon the dead furniture—no figure of romance when the advocates speak about a pool of blood around the weltering, dead corpse—little marks of blood upon the carpet, drops that had fallen from something—from the bloody dagger, from the bloody sleeve, from the bloody form.

There was a safe—the safe which once before she had robbed, upon which she had committed the petit larceny of stealing papers—that safe was found next morning not with the catch down as the careful man of business leaves it, but a little up, showing that it had been entered, as it could be, for the key was in his pocket. And his hands were found laid down, carefully disposed, with his limbs carefully laid out—not the way a man would fall in his convulsive death-throe, but as a man might lie, laid there by another hand; not the

hand of a man that would escape into the street, but the hand of a man who had the pass-key of the house, who could reach outside of the door to take the key in and let fall those three or four drops of blood that tell the dreadful tale. He fought, no doubt, with the desperation of a whole army; and he fought with the whole army of miserable, pestering hates which cluster in a woman's heart.

"Heaven hath no rage  
Like love to hatred turned,  
And hell no fury like a woman scorned."

Scorned she had been — scorned to her acquaintances, scorned to her face, scorned to her domestics. Into no other breast but hers came that night that hell that hath no fury like a woman scorned; and by every hypothesis it was the hand of someone who knew that house, who had the time to stay; and in that room back there sat a silent watcher, a sick man, and saw the form of someone in there—a man whose evidence has never been given to the public—and though it forms in itself the essence of a very small circumstance, it shows conclusively to the mind of the prosecution that there was no haste about that thing; that it was as deliberately followed up as it had been deliberately planned and promptly and efficiently executed. There lies the dead man, the shadows of midnight falling round him and the crime, and she alone with him. I choose to make no charges yet against those who were in that house; she stands alone in this indictment, and alone we are at present trying her. I choose not to ask you to picture to yourself the aid of a child, and that child a daughter; let the circumstances give their own solution to each of your minds; and in contemplating this catastrophe you must irresistibly be led to think that the deed was the deed of someone in that house; for, locked and barred as it was, it stood as much alone, although in a popular city, as if it were in a hamlet or on a heath. There lies the body, carefully and decently laid out. Who but a woman, whose artfulness and cunning only go to a certain extent, would ever harbor in her thought that per-

sons would take that man to be either the suicide—a man who had died by his own inanition—or a man who had been murdered by someone who escaped as hastily and as rapidly as he came? Who but a woman would have laid that head so near the door that it was very difficult to turn the door? Who but she should have a pass-key to leave by the other room? There is a fire in that room, and a wash closet close at hand; the lodger is not to come in until twelve o'clock; the moments are precious—and precious moments have their haste as well as their desperation. The lighter garments can be burned in this fire, but then the woolen cannot, and there is a smell of leather. If it were to be burned there, the odor would go through the house; if it were to be burned in the kitchen, the odor would go through the house. Carefully taking the clothes necessary to be taken, she ascends the stairs, passing the cook, who was profoundly sleeping, into a room seldom used, where a fire is made. Another watcher is opposite—Dr. Parmly. He had lived there long, and he was an observing man; and there is a curiosity about men, as well as women, to know the ways of those who live near them. He had often noticed that they had a dark room little used; but this night, looking across, he sees a light flashing up and flickering as if something strange were being placed on the fire, and then the passers-by perceive in the air this odor of burning woolen and leather. Their attention is specifically directed to it at that house.

Thus you perceive everybody excluded, she with the motive, with the opportunity, with the motive and the opportunity, with the lodger out, with this light to be accounted for by her to you; because these physical signs are to be accounted for by explanation destroying the evidence of her guilt. All night long he lies there, and the gas, which has been lighted, is burning; it is found next morning, and the key is on the outside; his watch is stopped at half-past six o'clock in the morning, showing that the deed had been done almost at the moment he entered the room, as he had no time to lock the door and wind his watch. And they upstairs, she,

the former mistress, the wife, as she says, upstairs, merry-making. Word is brought to her by the inmates of the house and the neighbors that Dr. Burdell is dead. He is dead; they tell her so. What, gentlemen, is the instinct of the man or the woman, not to say the wife or relative, or even the friend? There is one of two things—either the fainting and the unconsciousness at the dreadful news, or the rushing to see if it be true. She was ready to act her part. She does not go down; she has her great apparent agitation, but no redness of the eyes of any consequence; and when Dr. Main comes in and says, “Dr. Burdell is dead,” she says, “Oh, I am so glad to hear that;” not to see it, for even then she had not gone downstairs to see it, and even then she had not gone downstairs to render that duty which, as a wife, she had sworn to render. “I am so glad to hear that, for I thought he was murdered,” and, almost instantly, “I have a dreadful secret to tell you,” she says, to this one and that one, and out comes the marriage certificate; “my name is Emma Augusta Burdell; I was married to the doctor; here is my certificate.” No going down yet to see whether he were dead or murdered, but moving about the room, spasmodical in one corner, calm in the next, theatrically tearing her hair in another place—the same feelings in her breast that were there on that night when the Coroner sent up to examine her as a witness, and said, “I won’t come unless I have counsel.” Why, what has this woman to do with counsel? If it were her duty to see if he were dead, it was doubly her duty to protect the character of her house and children, and to rush down to explain, if she could. At that time she was at liberty in her house, and the son-in-law of the Coroner himself was her counsel. He was there through Sunday, until she perceived herself that abler counsel than he was needed, and my learned friend came to her aid and succor and to close her lips thereafter.

I shall ask you to say that every single attribute was the attribute of a dramatic person. She had a fur cape drawn up about her neck when she did come down to testify, but

not so high that a watchful witness could not see the redness upon her neck, the counterpart of that mark around his neck. The cord placed around his neck, whether it be the cord of a muffling woolen bag, or the cord that a woman knows so well how to use, the counterpart of the mark upon the one was upon the other, and one disappeared as rapidly as the other. Had she thought of strangling him to take him into the street, and, when he fought so desperately, as the wounds in his breast attest, did she not dare? Gentlemen, I call your attention to that; it is a strong and important fact in the case; every little bit of her demeanor on that morning is worth your while. For see! A murder is planned, and no one knows it but the planner; there is an ability to dispose of everything; there is an effort to cover up the base act in one's own house; and yet the prosecution are not bound to bring before you the man who saw the deed done, for he might lie, and he might be the enemy himself.

The prosecution will bring before you such circumstances as well convince the twelve men, we swore yesterday, that that was done by somebody in that house. Away with justice forever, if circumstances like these do not call, trumpet-tongued, upon the defense to reverse the rule of law; let the innocent prove that he is not guilty if he can. Now see; group these circumstances this way—the circumstances anterior to this very week. The week commences, as I find, with a quarrel, and the domestics hear it, and light words about his death pass upon the tongues of some of the family. This week progresses with quarrelling, and terminates with murder. Then, the circumstances occurring on that day, the near approach, the signing of the paper, the watching during the day, the inquiries about the time that this and that man would be in, the circumstances of the murder itself, the fifteen wounds of fiendish hate and malice and revenge, her conduct next morning, her evidence before the Coroner's Jury contradicted in the most vital part, her demeanor in the afternoon, her refusal—for we shall make that a point—



afterwards to testify in this thing while she had the opportunity, and while peradventure she might turn the tide that was overwhelming her in the public estimation.

And then, if it come to appear, as I think it must, that that deed was done by someone in that house, we ask who did it, who had the motive? Was it she who hated him, who scorned him? And he had scorned her, and had cast her off, and was about to cast her homeless into the world. Was it she who had threatened him, and had obtained, by threats and menaces, the signing of papers which, as I said before, the threats of few men would accomplish? Was it she who had the dramatics in the morning, who had such a tender wish for counsel in the afternoon, when she was made a witness? Was it she who went into mock-heroics over his body? I shall greatly mistake your comprehension if you do not arrive at the conclusion that it was done by some person in the house, and by her who had a motive, who expressed a motive by threats, upon the very eve of its consummation, who had the ability to do it and to conceal it; and having spread these facts before you, we shall call upon our learned friends upon the other side to say what of this motive? who has a greater? What of this hatred and revenge and malice? Where is there another who had greater ability to do and to conceal? How could entrance have been obtained to that house? And if they shall fail in that, we shall claim hereafter, when the evidence which I have outlined shall be fitted together, to say that woman, whether she be called Emma Augusta Cunningham or Emma Augusta Burdell, whether she be the mistress or the wife, whether she had the simulated or the real marriage, that she—woman though she is—was guilty of the crime.

#### THE WITNESSES FOR THE PEOPLE.

*Dr. J. W. Francis.* Am sixty-seven years of age; have been in the practice of physic forty-seven years, and during a considerable portion of that

time a professor of medical jurisprudence in the college; have resided in Bond Street, near Broadway, for twenty years; on the morning of Saturday, 31st



January, was called into the house 31 Bond Street, at ten; accompanied the messenger, whom I did not know, to that house; ascended the first and second flights of stairs into the second story back room, which was the dentistry office of Dr. Burdell; as I was ascending the stairs asked if the person was very ill; the messenger told me he was dead, and they wanted to know the cause of his death; there was a police officer at the door; as I entered the room I stepped into blood; there was a large quantity of clotted blood on the floor; I saw a large, stout, strong muscular body, seemingly in great health, lying dead on the floor; a gentleman in the room I don't know who he was, told me he had turned the body over, but had let it lie in the same place in which he first saw it; the face was now upward; the clothing of the body seemed to be very tenaciously wrapped around it, and upon feeling it I found it a mass of soaked linen and clothing super-saturated with blood; between the body and the wall was a large mass of clots of blood, which might have been forming for some four or five or six hours, and some of which might have weighed half a pound, and some a pound and a half; the blood had coagulated; one of the men asked me to move around cautiously, for there was a good deal of blood about there; was not familiar with Dr. Burdell, but had seen him one hundred times probably; the Coroner came up and told me to wait a few moments, as Dr. McKnight, his assistant, was in the next room and would

be ready in a few moments, having a case with some instruments or probes, to make a thorough examination of the body; in a few moments Dr. McKnight entered; we took a look at the countenance, and found it to be surcharged, plethoric, full distended face, with the eyes obtrusive, with the mouth firmly drawn together, and with the tongue protruded between the teeth; it looked as though the man had died of a convulsion; in examining farther, perceived a line sufficiently distinct passing around the front part of the neck; thought of that popular idea of garroting, but said nothing about it; observed under the angle of the ear and jaw, on the left side, a wound; on being probed it was found to extend nearly the whole length through the neck; it had divided the carotid artery and the great vessels of the neck. We found on the cheek—the malar bone—on the left side, a wound that went down and inwardly into the face; on the one side there was one distinctly marked; on the left side there was an abrasion; lower down on the right side, near the clavicle, was a wound which extended directly into the thorax some six or seven inches, and running into the internal portion of the chest; on the right arm was a transverse wound, pretty low down; on the left arm, near what is called the deltoid muscle, where the swell is, there was a wound that went down four or five inches; there was another wound on the same arm, lower down, that went in two or three inches; the clothes being removed from the body, and the abdominal region and

trunk all exposed, it was immediately apparent how many additional wounds had been received; there was one on the left side, between the fourth and fifth ribs, which extended some six or seven inches, perhaps seven and a half; about two inches lower down there was another wound that ran upward in the region of the heart, and which proved to be in the auricle of the heart; there were two or three wounds in the abdomen near the region of the stomach in the abdominal viscera, that extended inwards, I should say, some four or five inches; there was another wound near what is called the margin of the hip, that ran inwardly and outwardly on the left side; there were altogether fifteen wounds; there was also another wound of great importance, a wound under the left auxiliary or arm-pit, which extended in many inches, some six or seven; the course of that wound in the arm was directly inward and down towards the thorax; the mark of the ligature about the neck was rather heavy; I suppose it was about a third of an inch broad, or a little more perhaps; many of these wounds might, in their nature, have been fatal; I should suppose the wound under the arm was aimed at a vital part; when that wound was received undoubtedly the arm must have been raised; the wound about the fourth and fifth ribs ran upward; the wound two inches or so below that ran forward, so that the cavity of the heart and apex of the heart were reached by two different processes; three of those wounds in the

abdomen in front looked like a kind of helter-skelter driving without any special object; it is impossible to decide whether the wound in the carotid artery or that in the heart was given first; after the wound in the artery death would ensue in perhaps some two or three or four or five minutes; as to the wound in the heart, I could not say how death would ensue from it; I have known a person to travel about the house with a wound in the heart, and then sit down and die; it depends somewhat on what part of the heart it is wounded; with a wound in the apex of the heart, which is solid, a person might live a long time; if in the substance of the heart he might die almost immediately; the auricle of the heart and the apex of the heart were both wounded in this case; the wounds all seemed to be inflicted by something like a similar instrument, an instrument of about two-thirds of an inch or a little more in breadth, and we thought sharp-pointed, and some eight or nine inches in length; the wound would naturally enlarge a little after being cut; the wounds most assuredly produced death; there was no apoplexy in the case nor anything of the kind.

*Cross-examined.* We had no dissection; while it is possible to tell accurately the direction of a wound without a dissection, a dissection is rather a better help. From the appearance of this man, I judged him to be a strong and muscular man. The wounds were sharp-edged and clean, and they seemed to have been made by a sharp-edged instrument on both sides; have

seen countenances like his of men who have died of convulsion, but it would be wrong to suppose that he died of convulsion; there were full evidences of strangulation in his case, wonderfully strong, a protruded tongue and distended large eyes. As no examination of the thorax was made, the wound in the left shoulder we inferred went into the cavity of the thorax without cutting any very large vessel. It would not have required a great deal of force to have made that wound. The wound in the neck might have been mortal; the wound under the mastoid lump was alone sufficient. The wound upon the anterior part of the chest, between the fourth and fifth ribs, wound under the left arm, and the wound under the edge of the right clavicle, and even the abdominal wounds might have been mortal, although it is possible that the man might have survived them. Some of the wounds had been inflicted with a little anatomical knowledge; thought that others had been inflicted without any extraordinary care or attention. Made a remark that these wounds seemed to evince anatomical knowledge. As to the wound under the arm, it looked as though the person might have stood rather more backward than in front, rather more behind than upon the anterior part. As to the one upon the left arm, I think the person must have been rather upon the front; some of these wounds evinced a reckless mode of administering them, and seemed to have been made in a hurried manner; once came to the con-

clusion that the blows might have been inflicted by a left-handed person, but it would have been better to have examined them more minutely to determine this question; was rather inclined to favor the idea that it was done by a left-handed person.

*Hannah Conlan.* Lived in the house at 31 Bond Street going on two years; Mrs. Jones kept that house; never knew Dr. Burdell until I went to live in his house; Mrs. Jones stopped keeping house six days before May, a year ago; Mrs. Cunningham was boarding in the house when I went there, and began to keep the house when Mrs. Jones left; Mrs. C. had a room in the attic for a while during the time she boarded, and then a room below, next the doctor's, on the second story; she took the lower room when Mrs. Voorst went into the country, but she had been down there sleeping with Mrs. Voorst, before that lady left; Mr. Baker and Mr. Thayer occupied the floor over that in which Dr. Burdell's and Mrs. Cunningham's rooms were; Mrs. Jones' room was in the attic; could not say how long the doctor and Mrs. Cunningham had occupied that second floor; on the first Thanksgiving day after I went to the house, Mrs. Cunningham was sick; the doctor had gone to Brooklyn for her two daughters, and he being away, Mrs. C. cried: "Oh! doctor, where are you?"

*Mr. Hall.* What did Mrs. Cunningham say concerning Dr. Burdell at the time of her sickness, on Thanksgiving day, 1855?

*Mr. Dean* objected. It was altogether irrelevant. Suppose it was shown that Dr. Burdell produced an abortion on the person of Mrs. Cunningham, would that prove that more than a year afterwards she had murdered Dr. Burdell? Was it not done to blacken the character of that lady? What family in the city would be safe if the memory of a domestic was, in case of any charge against them, to go back to conversations so remote?

*Mr. Clinton* argued that it would be in direct violation of the ruling of the Court to allow testimony of one offense to be given as evidence of the commission of another.

*Mr. Hall* said that he had never heard that an abortion had been produced. He expected to prove from the witness the domestic relations of Dr. Burdell and the prisoner, from the time spoken of till the time of his death.

THE COURT allowed the question.

*Hannah Conlan.* Mrs. Cunningham said, in her sickness: "Oh! Doctor, where are you;" I went for a doctor, and while he was in attendance Dr. Burdell came home, went up stairs, and attended to her himself. Mrs. Cunningham was sick for about a month; I did not, at that time, know what her sickness was; saw a chamber vessel in Mrs. Cunningham's room, and took it down stairs; the contents appeared like the shape of a child. She said it was Dr. Burdell's; the doctor began to take his meals at the house, at the time Mrs. Cunningham took the house, six days before May, 1856; and for about two or three months they often had rough words; paid no particular attention to the quarrels; when vexed very much, she said she would be revenged on him; she accused him of keeping company with ladies, very often; on the third day before the doctor was killed, Mrs. Cunningham asked me what some ladies who had come to see Dr. Burdell were looking at; I replied that they were looking at the parlor, dining-room, closets and

wash-tubs; told her the doctor was going to let the house to them and sign a paper; Mrs. Cunningham replied "Perhaps he will not live to let the house, or sign the paper either;" the doctor went out that afternoon to dinner about five o'clock; I went to bed that night, at ten o'clock Mrs. Cunningham and Mr. Eckel came down and told me to go to bed, for it was near ten o'clock; I went up stairs to go to bed, and stopped in Mrs. Cunningham's room in the third story front; Mrs. Cunningham, Mr. Eckel, Mr. Snodgrass, and the two daughters were there; then went up stairs to the attic, and went to bed immediately; my room was boarded off with partitions from the rest of the attic; Mr. Snodgrass and Miss Helen Cunningham came up stairs before I went to sleep; that was the last I saw of them that night; got up next morning about seven o'clock; did not notice any marks upon the floor or walls as I went down; it was dark, and I had a lighted candle; the first person I saw, was the doctor's boy; he came in at the basement door; I let him in;

the door was bolted and locked; the next person I saw was a young woman who was engaged to come there and live; went up to Mrs. Cunningham's door to call her to come down, as breakfast was ready; she asked me if Mr. Eckel was down at his breakfast; said he was not down; I had not seen him that morning; Mrs. Cunningham and Miss Helen came down to breakfast first; Mr. Eckel was not at breakfast; Miss Augusta and Mr. Snodgrass came down afterwards; it was half an hour after that when little Johnny, the doctor's boy, told me the doctor was dead; went up stairs to the doctor's office, opened the door, and saw the doctor lying with his hand twisted around on his back; was much excited, and went up stairs to Mrs. Cunningham's room; they had all gone up stairs from breakfast; saw Mrs. Cunningham, her two daughters, and Mr. Snodgrass; Mr. Snodgrass was playing on the banjo; I said, "My God, you are enjoying yourselves all very well, and the doctor is either dead or murdered in his room;" Mrs. Cunningham asked me what I said, and I repeated it over again; she looked very excited, and ran over to the bed; so did Miss Helen, who fainted; Snodgrass ran down stairs and came back; he said, "That's a fact, he is dead;" Mrs. Cunningham cried, but did not say much; I ran for Dr. Stevens.

*The District Attorney.* Did you ever hear Mrs. Cunningham say anything about Dr. Burdell and Mr. Eckel? She said that the doctor was jealous of her and Mr. Eckel, because he had told her he had looked through

the key hole, and saw what he did not like; she said this a little before he was murdered; there were no servants but myself in the house on the night of the murder.

*Cross-examined.* Was first employed by Mrs. Jones a couple of months before a year ago last Christmas; defendant was boarding there then; I was employed there as cook; when I first came Mrs. Burdell occupied the room next to the one where I slept—the back one in the attic; afterwards she slept down stairs with Mrs. Hubbard; Mrs. Hubbard is a cousin of the doctor's; heard she got a divorce from her husband who was named Voorst; was in the employment of Mrs. Cunningham until I was taken in custody—from May until January; Mrs. Cunningham and the doctor were friendly; he took her out very often in the day time; they were friendly together until Mrs. Voorst came there. Some difference between them last fall when this woman (Mrs. Voorst) came into the house. Mrs. Cunningham had forbidden the doctor to bring this woman into the house. She said that she would not allow any correspondence between her and the doctor. She said she was not a good woman. Mrs. C. accused her and the doctor of having sexual intercourse with each other. Three or four days before this homicide, there was no other servant there but myself and the doctor's boy. The doctor began to take his meals there when Mrs. Burdell took the house. Think it was about two months. He did not take his meals of Mrs. Jones. He

dined there the Christmas when Mrs. Jones kept the house by Mrs. Burdell's invitation. Mrs. C. accused the doctor of having ladies come there for improper purposes; heard unpleasant and rough words between them. It was a little while before he was killed; about the signing of papers. It was when she was going to enter a law suit against him, for she said he had done her a heavy wrong, and she would be revenged upon him. Know Mary Donohue. Recollect when Mary left the doctor's house about three days before the murder. Don't know whether Mary and the doctor had fights and quarrels. There might have been sharp words about cleaning and sweeping, and raising of dust. Never heard Mary use any threats about the doctor. Have never used any myself; Mrs. Burdell took care of the clothing of the doctor at the time of his death. I did his washing and she attended to his clothes. When I went up to the room to tell them about the murder Snodgrass was writing. Eckel was sitting at the fire. The front door was bolted all the evening. I always bolted that door. Heard Snodgrass come up stairs after I went to bed, and heard Miss Helen Cunningham come up; heard them bid good night to each other; heard Helen go down. Do not know where Helen and Augusta slept that night. With the exception of what I have said as to the hard words between Dr. Burdell and Mrs. Burdell, her conduct was very kind and sociable enough. She always called him doctor. Heard her address him

as Harvey. After I went upstairs to announce that the doctor was dead, I stayed there until Mr. Snodgrass went down stairs, came up and said that that was the fact. I went over and caught Mrs. C. by the hand, she was fainting away; went down then and called the next door neighbor, and I went for Dr. Roberts. I have been married but my husband is not living. Have not been in the habit of getting drunk; could not take my share, but never so much as not to be able to work. Have never been charged with any criminal offense.

*Catherine Stansburg*, the wife of the cashier and accountant of the New York Express, have known Dr. Burdell twenty years. Went to No. 31 Bond Street at Dr. Burdell's request; my object was to hire the house from May 1, 1857; was there on the Friday afternoon preceeding the doctor's death; the papers were to be signed the next morning; Dr. Burdell and my mother went through the house with me; I saw Hannah, the cook; I did not talk with her at that time; Hannah was present while we were conversing about renting the house; did not see Mrs. Cunningham; had previously been to the house to see Dr. Burdell; once saw Mrs. Cunningham there; Demis Hubbard was in the house on Friday, 30th January, never saw her before; she was there before I arrived there.

*John J. Burchell*. Was in the employment of Dr. Burdell for about a month previous to his death; knew Mrs. Cunningham; on the day before the doctor's death was in the doctor's



office with Mrs. Cunningham, between seven and eight o'clock in the morning; she asked me if I had the ashes out of the stove, and I said, "yes;" she asked me who sent me, and I said the doctor; I was to tell Dr. Cox that he (the doctor) would be back from the bank by 11 o'clock; Mrs. Cunningham said to me, "the doctor is a passionate man;" I said, "Yes, ma'am;" then she said, "he will get over his passion in three or four days;" never talked with Mrs. Cunningham about Dr. Burdell; do not know personally of any difficulty between her and Dr. Burdell, except a quarrel about coal; went to the house the next morning between seven and eight o'clock; the basement door was bolted, when the cook let me in; the back basement door was fastened; went into the yard for a scuttle of coal, and had to unbolt it; I went into the doctor's room between eight and nine o'clock; the key was outside the door in the lock; did not see any blood outside; knocked at the door before I went in; when I got no answer I opened it; saw blood on the side of the wall of the room; saw the doctor's body; only opened the door about six inches; he laid so near the door that a common sized man could not get in without pushing away the body; put my hand against the side of the door, or I would have fallen down; went and told the cook, and afterwards went up to Mrs. Cunningham's room; Mr. Snodgrass was holding her on the bed, and she was crying; heard her scream; she did not speak to me; Snodgrass spoke to her; I do not know

what he said; I was there ten minutes; I went to the front parlor when I left her room; Snodgrass came down after me, and told me to take charge of the front door; Snodgrass ran into the street; he returned with Dr. Roberts.

*Cross-examined.* Saw Eckel that morning; it was just when I came in. Am fourteen, going on fifteen. Saw money paid to Dr. Burdell on Friday by Dr. Smith. Bills. Between two and three. The Doctor breakfasted at the Metropolitan Hotel.

*Mary Donahoe.* On November last went to live in the family of Mrs. Cunningham as chambermaid and waitress; Dr. Burdell lived in that house at that time; attended to Dr. Burdell's office and bed-room, besides doing all the rest of her work; always made his bed; one day while making the doctor's bed—(his bed-room being then the back room, and his office the front one)—I heard a great deal of talk in the front room; recognized Dr. Burdell's voice very well, but there was also a female voice which I did not know, till afterwards; the noise continued for some time—more than ten or fifteen minutes; when the doctor came out into the bed-room, walking very fast, he hurried into the front room again; the person with him there was Mrs. Cunningham; heard him call her a bad woman, or words to that effect, and Mrs. Cunningham, in reply, informed him that he was a bad man, a wicked bad man; he seemed, by the noise, to take hold of her, and push her out, as he said these words to her, ("that she was a bad woman,")

and then locked the door on her; she (Mrs. Cunningham), from the entry, came into the bedroom where I was making the bed, and seemed very much excited and flushed; she asked me if I had seen the doctor take a gun out of that closet, and I replied that I had not, as my back was to him when he came in; Mrs. Cunningham then said to me: "Mary, you have no notion of what a bad man that is;" she said that he was a bad, passionate man; upon which I remarked: "Bess, me, ma'am, he must be dangerous!" She then told me what the noise was about—that the doctor wanted to bring some woman back to the house, which she did not wish, as she (the woman) was not a good character, and she did not wish him to bring her in among her daughters; I said she was perfectly right in that; Mrs. C. then said: "Mary, I don't wish you to take any notice, or make any remark of what is said here, or done; I can manage him myself;" which ended the conversation; while I was living there Mr. Eckel slept in the small room; there was a door in the partition between these rooms; I attended to all the rooms in the house; had often heard Mrs. C. say that he (the doctor) was a very wicked, bad man; that there was no doing anything with him; heard that about three weeks before the murder was committed; it was a frequent thing for Mrs. C. to say so, but I did not remember to hear her say that within three weeks before the doctor's death; never heard her say anything about the doctor being married, but when Mrs. C.

complained to me of his being so cross, I joked her about it, and said: "Perhaps, ma'am, if he was married, and had a wife to guide him, he would not be so cross;" to which Mrs. Cunningham replied that it would be a pity of any woman who would get him; thought this was a fortnight or three weeks before the murder; they were talking at the breakfast table about the words the doctor had had with Snodgrass; Mr. Eckel remarked that he (meaning the doctor) deserved a good knock down, if it could be done handy; Mrs. Cunningham did not seem to make any remark; she merely laughed; that morning there was nothing more said, but on the following morning they were conversing again about the doctor's ugliness; there were present Mr. Eckel, Mrs. C. and Miss Helen; the two children were at the table, and Miss Augusta was present too; the conversation was a general one; they were talking about the doctor being an ugly man; Mr. Eckel was eating cakes at the time, and laughing, when, putting down his knife and fork, he rubbed his hands just so, like making fun, and said: "By jingo! shouldn't I like to be at the stringing up of that old fellow, if I would not have too hard a pull at the cord." Mrs. Cunningham seemed to give a little laugh; she did not say anything, but told me I need not remain in the room any longer; on the Saturday night before the murder I heard a great deal of noise in the doctor's room; I could not distinguish between the voices, the noise was so great; just then a ring came to the door and I went to it; the



noise up stairs continued for about fifteen minutes; saw the doctor running down stairs; about an hour before I heard the noise, had seen Mrs. Cunningham go up stairs; that night about nine Mrs. C. came into the kitchen and told Hannah and me to get ready as quick as we could and go to bed; had never before ordered us to bed in that way; I asked her could I not stop and set the table, and do some other little things, it being Saturday night; she came back twice and said: "Now, look here, Mary, I don't want a muss;" I said I would make no muss, as I had only to clean her knives and wash her silver; Mrs. Cunningham then said to Hannah: "Mary does not understand what I mean of the affair about the doctor." "Oh!" said Hannah, "you need not care about that, for Mary was in the entry and heard all the noise, and all that the doctor said in passing her by." Mrs. Cunningham then went up stairs and came back again. One time Mrs. C. sent me with a plate of soup to the doctor, who had a bad cold, and he refused it. I very often stood behind Mrs. Cunningham's chair and remarked that she used her left hand more than her right; I saw that Mrs. Cunningham used her fork a good deal and generally used her knife in her left hand to cut with. I left the house on the Wednesday before the murder, at about half-past six o'clock in the evening.

*Cross-examined.* I recollect overcoats being stolen out of the hall a long time before the murder; overcoats were stolen twice, one of which belonged to George Snodgrass, and the other to Mr.

Eckel. The soup I took to him was not specially prepared for Dr. Burdell; it was soup made for the family; the doctor had a cold at that time.

Cannot remember who began the conversation about Dr. Burdell; I think it was Mrs. Cunningham; she said George Snodgrass could have him punished for using the language to him that he had done, after getting up and letting him in on Sunday night; the doctor said he would knock his brains in for putting a bolt in the door, so that he could not get into his own door, and she (Mrs. Cunningham) said that George Snodgrass could have him arrested for that language. Mrs. Cunningham used her left hand in eating and I thought her left-handed.

*Dr. Stephen A. Mayne.* I am a dentist; I live at No. 32 Bond street, exactly opposite Dr. Burdell's; was called into Dr. Burdell's on the morning of January 31, between eight and nine o'clock; ran up to the doctor's room; placed my hand upon him, and found him dead; passed into his bedroom, and found his bed had not been tumbled; I locked the door of the office, and gave the key into the hands of my student, who had followed me in; Snodgrass called to me to come up stairs into Mrs. Cunningham's room; went up—saw Mrs. Cunningham and her two daughters there; Mrs. Cunningham asked me if he was dead and what was the cause of his death; I told her he had died from the bursting of a blood vessel, or an hemorrhage of the lungs; she asked me who was in the house; I told her I had seen no one but the dentist Smith's boy, who

stood at the door, when I repeated that he had burst a blood vessel, she said she was glad that was the case, for Hannah had told her he was murdered; she wished that I would keep a good lookout for Dr. Smith when he came, for he was a bad man, stating that he had nothing in the house except a case of instruments—all the rest of the things were her's and Burdell's.

When I went to Mrs. Cunningham's room, she was very excitable and agitated; no one but Snodgrass came into the room while I was there; was out with my wife at a party the night before, and returned home about one o'clock; as we came into Bond street, my wife called my attention to a peculiar smell, as of something burning; I did not notice it particularly myself, till I came near my own house; when I got out of the sleigh, I noticed it very plainly.

The smell was like the burning of woolen or leather; was in the room when Mrs. Cunningham was brought before the coroner for examination on afternoon of January 31st; do not recollect how she was dressed, except that she had a large fur cape on.

*Cross-examined.* It was very cold; a stormy day; went to Dr. Burdell's house that morning because the doctor's boy came for me; was the first person in the house, except the family. When I went to the house the curtains were pulled down and the lattice was closed.

The gas was turned up so as to give a full light; a bunch of keys lay upon the secretary—this desk was open, and there was a bank book lying upon it. There were traces of blood upon

the outside of the door; cannot say if it was drops of blood, or a brush from a garment; coming down stairs, on the side of the wall of the house there were several spots of blood. On the outer door that leads into the street, there was blood on the inside about four to six inches above the lock, on the edge of the door where it shuts. Upon the center table there was a paper that had some blood upon it; upon the sofa there was a shawl and cap; there were no marks of blood upon the shawl or cap; there was no blood upon the bank book that laid upon the secretary, nor upon the portfolio which was lying upon the case of dental instruments; there was considerable blood on the right side of the chair—on the back part of the chair.

Dr. Burdell was a man of about five feet eight inches; a very solid built man, and weighed about from 160 to 170 pounds, whose appearance indicated a great deal of muscular strength; Dr. Burdell had about his neck a black silk handkerchief and a common linen collar; a standing up collar; the neck handkerchief appeared to have been twisted choking; it was not done with a cord, but something larger; we took it to be with his neck handkerchief he was choked, for his tongue protruded; was of opinion that the wounds were inflicted by some person standing behind, and holding him by his right hand, as there were no wounds in his right arm, but his left was cut in three places; round his right wrist there was a little rubbing, as though it had been rubbed; was of opinion that most of the wounds were given

from behind, though not all; it must have been a very tall person, for when standing up a person could not inflict those wounds unless very tall; if done in front, a person of any height could have done it; that was my theory. As to the cut in the carotid artery, I think it was done by a person standing in front; it was struck in a diagonal form; we probed that wound, and found it to be six or seven inches.

May have told Mrs. Cunningham that she had better not go down stairs, and that I had immediately sent for the police and the coroner; I had put my boy at once to watch the door, and let nobody in; do not remember taking hold of Mrs. Cunningham's hands and placing her upon the sofa, and saying to her, "stay there," or, "you must stay there;" I know that Snodgrass caught hold of her to keep her quiet, and told her she could do no good.

The COURT thought this was not testimony.

*Mr. Dean.* It is a part of the *res gesta*. The district attorney said that she was playing theatricals.

The COURT. Counsel are very well aware that the opening is not testimony in the case. The court and jury will, I trust, discriminate between what is said by counsel and what by witnesses. I shall rule your question out.

*Mr. Romeyn.* Then what Mr. Snodgrass said or did to Mrs. Cunningham you will not permit us to offer in evidence?

The COURT. No, not now.

*Mr. Romeyn.* Then I will ask you to note our exception. I offer to show it as a part of the *res gesta*.

The COURT. Go on and examine the witness.

*Daniel Ullman.* I live in the St. Nicholas Hotel, and am a lawyer; on January 30th last I boarded at the St. Nicholas Hotel, and had a lodging room and study in the house, No. 31 Bond street; on that same day, which was Friday, I saw Mrs. Cunningham; I had returned to my room in No. 31 Bond street, and just before five when I was leaving to go to the hotel for my dinner, I met her in the passage, and she apologized because there had been no fire in my room; I answered it was not of much consequence, inasmuch as I would be out the whole evening. I returned to my room at 12:30; in coming into the house I opened the front

door with a latch key; there was then no light in the hall; I heard nothing unusual before retiring; next morning I was roused about half-past eight by the voice of some one running up the stairs and crying, "Good God! Good God!" It was the voice of a woman; I then heard some expression of "Dr. Burdell is dead!" The voice proceeded from the third story hall; my room was the rear room on the third story, and the voice came past my door; then I heard several voices shrieking, from the front part of the house; first voice I did not recognize; the shrieks, which were very loud, were in the voice of Mrs. Cunningham; three or

four minutes elapsed, when a person threw herself against the door, and cried out, with a shriek: "Mr. Ullman, Dr. Burdell is dead!" That was Mrs. Cunningham's voice; I then sprang up, dressed myself and went down stairs; I did not see Mrs. Cunningham at all that morning, nor until late in the evening; I went down to the door of Dr. Burdell's office and found a young man standing there; I asked him what was the trouble, and he said, "Dr. Burdell is dead;" I said, "Let me see him;" the young man opened the door, and, as it sprang open, I saw the doctor lying there, evidently dead. I closed the door again, and a short time after an officer and one or two other persons entered the room. Do not know whether Dr. Mayne had been in before that time; I do not know Dr. Mayne, nor the name of the young man who stood at the door; since understood that he was an office boy of Dr. Mayne.

*Cross-examined.* Am a practicing lawyer in the Supreme Court; I had a night key to that house; there had been an ordinary lock on the door, very easy to be opened with an ordinary night key; in December Dr. Burdell caused a new lock to be put on the door, a patent lock, which was exceedingly difficult to be opened; met the doctor one day and told him that it took me four or five minutes to open it; he said, "That may be remedied." It would open with the slightest touch; the very night of the 30th of January I opened it with extreme ease; the door was left sometimes without being locked.

Do not know who went to the

door, nights, when the door bell rang. One night found the outside door locked, rang the bell, and some one opened the door, and asked who it was; he came down and let me in; it was Dr. Burdell. Did not observe the smell of any burnt woolen or leather on my way home or in the house; did not see any light in the house; it was extremely dark as I went up stairs.

*A. Dewitt Baldwin.* Am a member of the bar, and reside at No. 16 Bond street; on the night of January 30 I left that house with three companions about half-past eleven o'clock; perceived a strong smell of burning clothes in the street; one of my friends remarked that somebody was burning up their old rags; did not observe any light.

*Edgar Davis.* Am a policeman; was called to Dr. Burdell's house, by Dr. Burdell, sometime in the month of September last; I saw Mrs. Cunningham and Dr. Burdell in the hall; Mrs. Cunningham told me to take no notice of what Dr. Burdell said, as he had ruined her family and her; she appeared to be very much excited, and said she would have satisfaction for what the doctor had done; said she would have his heart's blood, or words to that effect; I stepped in between her and the doctor, and advised her to stop, for she was doing wrong; I told her she did not know what might happen hereafter; I advised her and the doctor to leave the hall and go into the parlor; in the meantime Officer Little came in, and did the balance of the talking; Dr. Burdell told me, in Mrs. Cunningham's presence, that he had lost a note, and that she had

taken the key of his safe out of his pantaloons pocket while he was asleep; I advised him to go to a police magistrate and make a complaint; Mrs. Cunningham made no remark to this; Dr. Burdell said she had taken the key out of his pocket, opened the safe, and taken the note out; this conversation took place in the forenoon of a day about the middle of September; on the morning of the discovery of the murder I went again to the house and saw the body of Dr. Burdell lying on the floor of his office; Dr. Smith was there, the office boy, and Officer Little; I saw the doctor's pockets examined; he had a watch, a night key, the key of his safe, and some other small keys; his watch had stopped; the lid of the bookcase was down; the door of it were shut; I remained in the house all day; I saw Mrs. Cunningham in the morning up stairs in her room, but did not speak to her; she appeared to be in distress; her daughters, Mr. Snodgrass and the two boys were there; was sent after Mrs. Cunningham by the coroner, who wanted her to come down and give her statement; she said she would not go down without consulting with her lawyer; I went down stairs and told the coroner; the coroner's son said she would have to come down; next morning I saw Mrs. Cunningham and advised her not to talk about the murder; when I was in the house in September, Mrs. Cunningham struck Dr. Burdell on the shoulder; on the Sunday after the murder I was present in Mrs. Cunningham's room when it was searched by order of the coroner; a dagger, Dr. Burdell's

pistol, a key of his safe and two pocket knives were found; John Connery, the coroner's deputy and son, conducted the search; the dagger was found in her bureau; the safe key was found in the landing place of the attic, among some rags.

*Cross-examined.* A little money was found upon the person of Dr. Burdell at the time the body was examined, small silver and coppers; on the Saturday a great many people came to the house, 31 Bond street, not so great a crowd as the Sunday following; the coroner gave orders toward night not to allow any one to go up stairs; until the coroner's inquest was ended defendant was in custody up stairs.

*Silas C. Herring.* I sold a safe to Dr. Burdell in April, 1856; I furnished duplicate keys, as was the custom; on June 20, Dr. Burdell having lost a key, had the lock altered, so that the lost key might not open the safe; I had two new keys made for the altered lock; I always keep a record of all keys made by me, and on seeing a key, by referring to my book, can tell to whose safe it belongs; after 20th of June, the original key would not open the safe.

*Hector Moore.* Am a policeman; I knew Dr. Burdell during his lifetime; I went to No. 31 Bond street some time in September last, a different occasion from that spoken of by last witness; I met Dr. Burdell at corner of Broadway and Bond, and went with him to 31 Bond street; I saw, as we passed into the hall, Mrs. Cunningham stood there as if she had come just out of the parlor; Dr. Burdell, who had been talking to me about her be-

fore, said, "That is the woman, or the lady;" she replied, "I am his wife;" he made no response, but proceeded up stairs, whither I followed him; I did not see her after that until I came down stairs again; Dr. Burdell said nothing to her in my presence; I was there in that house again on a Sunday morning after the murder; I saw Mrs. Cunningham that day, and all her children were with her, in the bed room on the third story front; she and the younger daughter appeared to be arranging affairs about the house; they had just got up and were partly dressed; I was there some three hours or so, and went down to breakfast with them; I heard singing in the house that morning; Mrs. Cunningham and her daughter sung together; I did not call it sacred music, though it might have been, for I was not a good judge of music; I supposed they sang a tune though, and believe it was before breakfast.

*George W. Dilks.* Am captain of police; I was present at a search made in Mr. Eckel's bedroom on the Sunday evening after the murder; the papers exhibited by the district attorney I recognized as the papers in question; they were found in Mr. Eckel's bedroom, in a piece of furniture, used both as a secretary and a bedstead; there was present when these papers were found John Connery, a lawyer, whose name I did not know, but who acted as counsel for Mrs. Cunningham the day before the inquest, and Mrs. Cunningham herself; Mrs. Cunningham said the papers were her's, and she wanted them.

The *District Attorney* read the papers.

The first was an envelope marked in pencil on the top "Private papers, John J. Eckel, 171 Stanton st." Below was the address, "Miss Augusta Cunningham, 31 Bond st." The first exhibit was a declaration, with no jurat, and unsigned, of the loss of a certain note drawn by Mrs. Cunningham for \$612.30. The second was the assignment of a judgment for \$612.20, sworn to and signed by Harvey Burdell. The third was a paper relating to Mrs. Cunningham's private affairs. The fourth was a discharge of a judgment. The fifth was a paper relating to certain transactions regarding the same note, between Mrs. E. A. Cunningham and Edwards Pierreport. The sixth was a receipt, signed by Harvey Burdell, for \$84.30, on account of rent due November 1, 1856. The seventh was an unexecuted release to Dr. Burdell, signed by Emma A. Cunningham. The eighth was a security for a note signed by Mrs. Cunningham. The ninth was an unexecuted affidavit, signed by Dr. Burdell, and declaring that up to the 13th October, 1856, he had made no will. The tenth was a lease of the house in question from May, '56, till May, '57, dated 19th March, 1856, and executed between Mrs. Cunningham and Dr. Burdell, without witnesses, and with some erasures.

*Cross-examined.* I had charge of the premises under the coroner.

*Dr. Erastus Wilson.* I am a dentist at No. 27 Bond street; I knew Dr. Burdell, and was on speaking terms with Mrs. Cun-



ningham; I heard Mrs. Cunningham speak of Dr. Burdell at different times; she said that Dr. Burdell would learn to behave himself before she vacated his house.

*Warren Leland.* Am a proprietor of the Metropolitan Hotel; I knew Dr. Burdell; he was a guest at the Metropolitan Hotel from the fourth of January till the time of his death, a day boarder and had breakfast and dinner; he generally dined about five and breakfasted about nine; I did not see him on the day previous to his murder.

*Samuel W. Parmly.* Am a dentist at No. 30 Bond street, nearly opposite the house No. 31; my attention was attracted to No. 31 a little before eleven on the night of Friday, January 30; I was in my sleeping room that night until half-past nine o'clock; I then went out and walked up Broadway as far as Eighth street; when I went out there was something unusual in the atmosphere; I was at the corner of Eighth and Broadway when the lights were put out in the Mercantile Library, and by that fixed the time at ten, as that was the time of putting out those lights; I then went home and remained at home about fifteen minutes; called my dog and went out again, returning about eleven o'clock; while standing on the steps of my house I noticed something unusual in the atmosphere, different from what I noticed at half-past nine; it was the smell of burning clothes; my attention was attracted to a bright light in the west attic window of No. 31; it diminished very much, then flashed up again, and again subsided; went to stoop

of No. 31 for my dog, which was attracted there and would not come away; I noticed that the house, except the attic window, was very dark; I crossed the street again to my own house, and noticed that the light was still in the attic room.

*Mr. Clinton.* You stated that you went across to No. 31 Bond street to get your dog away. Have you not been frequently to other houses to get your dog away? A. No, sir. Did you not go to the house next door, where Mr. Robinson resides, to get your dog away from there? A. No, sir.

*Dr. Parmly.* When I came back the last time I saw two persons, suspicious looking characters, and I turned off from the walk; it was at a time when there was a great deal said about the danger of walking in the streets at night; they were shabbily dressed; they looked like rough characters, and they were walking in a manner that did not suit me.

*Edwin H. Stone.* I knew Dr. Burdell as a boarder at the La-farge Hotel during October, November and December, 1856; he took breakfast, dinner and supper there, and was a regular attendant at all the meals.

*Daniel Olney.* Am a carpenter; at Dr. Burdell's request ordered a lock on the door of the house No. 31 Bond street; the lock was supplied by Mr. Butler.

*William H. Butler.* Am a manufacturer of locks and safes; in the month of December last I placed a lock on the door of No. 31 Bond street; the keys to all the locks I furnished are made to vary; it was burglar-proof,



and could not be opened except by the key made for it, when a certain slide on the inside was properly fixed; otherwise it was no lock at all, and could be opened from the outside by merely turning the handles.

*Cross-Examined.* If any person leave the catch on the inside unfastened, it is not a lock at all; I do not know how the slide was on the night of the murder; I was called upon to alter the lock after it was put on, because it could not work; the spring was too stiff to allow the key to open it; there was too much pressure upon the key to open the lock.

*John H. Thompson.* Am a doctor of medicine; I knew Dr. Burdell, and know Mrs. Cunningham; Dr. Burdell called upon me early in October last, and asked me whether I had ever noticed, during my visits to No. 31 Bond, in his conduct, anything to induce me to believe that he was engaged to be married to Mrs. Cunningham; Mrs. Cunningham came in and asked what the doctor had to say; I replied, "I am telling Dr. Thompson that you have commenced an action against me for breach of promise of marriage;" she said, "What has Mr. Thompson to do with it?" he said, "I suppose you want money of me;" she replied, "No, you know I do not; you promised to marry me, and you shall fulfill your word;" I told Dr. Burdell I declined to have anything to do with the matter in any shape or way; Dr. Burdell asked me to think it over; I wrote Dr. Burdell a note, declining to have anything to do with the affair, unless compelled by law to do so; I was at Dr. Bur-

dell's house on the Friday preceding the murder; I was speaking to Mrs. Cunningham in the back parlor, when Dr. Burdell came down stairs; she opened the parlor door as he walked along the passage to the front door; she either said to him, "Where are you going, Harvey?" or "What time will you return home?" can not remember which; Dr. Burdell made some reply, but I did not hear what he said; I called on Mrs. Cunningham because she sent for me; she wanted to know if I had discounted a note of \$100 for her, and if not, she wished me to return it to her; I had discounted notes previously for her, of which she was the maker; I told her on this occasion that I had paid away the note she inquired about, in business, and would hand her the money, less seven per cent; I was not more than five minutes in the house; had never lodged there.

*Dr. George F. Woodward.* Made a post mortem examination of the body of Dr. Burdell, assisted by Drs. Wood, Uhl and Knight, the Monday after the killing; we reduced to writing the result of our medical post mortem; the document was in the handwriting of Mr. Dodge, now Dr. Dodge.

*The District Attorney* read the written description of the wounds in the body of Dr. Burdell as furnished by the witness and his associates to the coroner at the time of the inquest. The witness described the position of the several wounds by pointing out their relative locations on his own body.

*Cross-examined.* Am thirty-one; have been in the profession between seven and eight years;

in general practice—in surgery perhaps, more particularly; have a partner, Dr. James R. Wood; this is the first capital case in which I have conducted a post mortem where the parties were arrested for murder.

*John Connery.* Was present at the search of Mrs. Cunningham's apartments, and saw her bureau examined. Mrs. Cunningham said to the officers and himself that they would find nothing in the bureau. They did find some weapons—a dagger, a lancet, and a small five-barreled revolver, four of the barrels loaded.

*Dr. David Uhl.* Am a teacher of jurisprudence in the New York Medical College; assisted in the post mortem examination before the coroner at 31 Bond street; saw blood marks on the walls; seemed to me that it was a blood mark made by a finger; noticed several marks of blood upon the stairway; they appeared as if they had been made by a person placing a hand against the wall, in passing down stairs; they were quite distinct, and appeared to be blood; went into the room where Dr. Burdell's body was lying; I stepped into a pool of blood; the body was lying on the floor, perfectly naked; the coroner told me to walk in; found Drs. Francis and Knight in the front room, engaged in writing at a table; Dr. Knight is a son-in-law of Coroner Connery; there was no post mortem examination of the body made in my presence; there was never such an examination made, to my knowledge; the examination

which I made with other doctors, took place on the Monday following; do not know whether the wounds in the body were made before death or afterwards, only from appearances; consider it highly essential to have post mortem examinations in cases of death from violence; have attended over fifteen hundred examinations of persons who have died violent deaths, but post mortems were not made in all these cases; had no charge of the examination of Dr. Burdell's body; only assisted at it; the direction of the majority of the wounds could not be ascertained, as the body had been opened, and the viscera taken away; without a thorough dissection of the parts wounded, a perfect anatomical description of the wounds could not be made; know no reason why it was not made in this instance. The fact that the wounds were inflicted by an instrument sharp on both sides, might be determined without anatomical examination. The wounds could not have been inflicted by the lancet and dagger found in Mrs. Cunningham's bureau. A chemical analysis was made of the spots found on the ladies' dresses; no venous or arterial blood was found on any of those dresses; Dr. Gouley, Prof. Child, Dr. Van Buren and Prof. Doremus conducted the examination.

*Edward D. Connery.* Was the coroner who held the inquest over the body of Dr. Burdell; identified the deposition of Mrs. Cunningham taken on that occasion.

The subjoined extract is the concluding part of it, the words in parenthesis being erased: "I was married to Mr. Burdell by

a minister in a private house. (I don't remember the name of the clergyman or the house)—here Mrs. Burdell produced a certificate of marriage, which was solemnized by the Rev. Uriah Marvin, of the (Presbyterian) Reformed Dutch Church, in Bleeker street, on the 28th day of October, 1856. The certificate was given on the 29th day of October, 1856. This marriage took place subsequent to the period when Mrs. Burdell said a portion of the property belonged to her and another portion to Mr. Burdell.

“E. A. BURDELL.

“Taken Jan. 31, 1857, EDW. D. CONNERY, Coroner.”

It was on a further inquiry that I changed “Presbyterian” into “Reformed Dutch.”

The words “I cannot remember the name of the clergyman or the house” were erased because she further remembered the clergyman's name.

*Cross-examined.* Was a doctor of medicine in practice; arrived at the house 31 Bond street, on Saturday, between nine and ten in the forenoon and found there one or two policemen and Dr. Francis; proceeded to summon a jury and hold the inquest; ordered a post mortem examination to be conducted by Dr. McKnight, a physician in the city of New York; he was assisted by Dr. Woodward, Dr. Francis and others; caused the house to be searched; on the afternoon of that day directed the officers to keep Mrs. Cunningham in custody; by the advice of the jury sent for her to testify as a witness; was informed she would not come down without first consulting counsel; gave directions that she should come down with the officer. Did not, before the deposition was taken, tell her that I wanted her to give me her confidence. and that I would protect her; said I would do everything to make her comfortable in the house, and not for her interest, which I did; had orders from the

jury to examine the heads, necks, shoulders and arms of Messrs. Snodgrass, Eckel and Mrs. Cunningham; did not refuse her the privilege of seeing the dead body.

*Andrew L. Byrnes.* Reside at 35 Bleeker, directly in the rear of Dr. Burdell's house; from the room I occupy I can see the third story and attic of Dr. Burdell's house, but not the windows of the second story; on that Friday night I saw, at half-past two, a light in the upper story in the rear part of the house; it was in one of the two sets of windows—the third story or dormer.

*Frederick Fredericks.* Reside at 33 Bleeker, one door nearer the Bowery than the house of the gentleman who had just testified; my bed room was on the third floor; from my room could see easily the rear of the houses Nos. 31 and 29 Bond street; on that Friday did not go to bed till half-past eleven; after getting up to my room I sat down on a chair to take off my clothes, and caught a glance of a light in the window of the second story of one of those two houses, Nos. 29 or 31 Bond street; am positive this light came from the second story.

*Cross-examined.* The night was so obscure could not see

whether the shades of the windows in that house were down.

*Mrs. Schwartzwaelder.* Reside with my husband, No. 29 Bond street, the second story back room of which is our sleeping room, and adjoins Dr. Burdell's office, on the same floor of the next house; on the night of the murder went to bed about half-past eleven; the lower shutters of the windows in that room were of solid wood, and usually closed at night; they were closed on the night in question; before going to bed turned down the gas so as to leave very little light in the room; up to the time I turned the light down the shutters were closed.

*Cross-examined.* After going up remained alone until about 12 o'clock, when my husband came up; he did not remain up any time, but went right to bed; during that evening did not hear any unusual noise from the room of Dr. Burdell; remembered the Saturday evening prior to the sale of Dr. Burdell's furniture; whilst in the basement of my house heard very loud noises that evening, and heard them afterwards, very distinctly, when I went up stairs to my room; the noises were apparently as if some person was crying "murder." (*Counsel for Defense* stated that these noises were the results of certain experiments that had been instituted at the time and place referred to, and informed the court that witness' attention had not been called to them in advance.) During the early part of the evening of the 30th January had been in the front basement of my house; heard no noise, nor any noise at all that night; did not smell any-

thing particular that night.

*Col. Christian Schwartzwaelder.* Am husband of last witness; returned to my house that night, 30th January, about 12, and went up stairs to bed; the light of my sleeping apartment was very dim, and there was hardly any light in the room.

*Cross-examined.* The night was dark and foggy, but do not think it stormed at the time I went into the house; did not smell anything unusual in the atmosphere, either in the house or out of it; heard no noise after I got to my room; the gas was lighted in the hall on the second floor; could not say whether the shutters were closed or opened.

*Capt. Dilks* (recalled). Made experiments last week as to the extent to which the rear of the house, in Bond street, could be seen from the rear window of Mr. Fredericks' house, in Bleeker street; could distinctly see the rear of the houses Nos. 29 and 31 from it; those houses were very similar in appearance save that they were painted of different colors.

*Mrs. Foster.* Am one of the matrons of the City Prison; Mrs. C. was under my charge by day, and I had occasion to notice how she used her hands; observed her sewing with her left hand, and when upon one occasion I spoke to her about it, Mrs. C., in reply, said that she had been troubled with the rheumatism for several months and she was obliged occasionally to use her left hand on that account.

*Mrs. Lavinia Phelps.* Am night matron of the City Prison, and, as such, Mrs. C. has been under my charge; had noticed that Mrs. C. used her left hand aptly while

sewing and cutting, and when she used the scissors, needle and thimble.

*Cross-examined.* Mrs. C. complained of being ill; upon two or three nights she did; she said that she had had the rheumatism, which caused her to use her left hand.

*John W. Blivens.* Was attached to the Fifteenth district police station and was ordered on Saturday morning to No. 31 Bond street; reached there about half-past nine o'clock and went into the room where the doctor was killed and while there touched the body; on returning to the station house found my left hand was bloody and washed it; remained in the house perhaps ten minutes, but not longer, and then went back to the station house to make my report; went out of the front door.

*Cross-examined.* The whole face of my hand and the fingers that I used to turn the body over were bloody.

*Dr. David Uhl* (recalled). When I went to 31 Bond street I noticed the appearance of blood in the room and on the things in that neighborhood; looked into the little closet and did not find a single spot of blood there; the diagrams which represent the doctor's room and the spots of blood found there were made under my direction; they give an exact representation of the spots of blood as I found them there. An artist named Bensen made them; Dr. Mayne went with me and placed the furniture in the exact position in which he found it on the Saturday morning; I remained with the artist to see that he took the blood spots correctly,

and was present during the whole time he was making the sketches.

(*Dr. Uhl*, by means of the painting, then described minutely to the jury the location of the various articles of furniture in the room, and pointed out the stains of blood which were found upon the furniture, doors and wall of the room.)

From the position of the furniture in the room and the drops of blood, the first blow struck on Dr. Burdell, I think, was struck when he was sitting in the chair by the secretary. The first one was the one in the right shoulder in the clavicle. In my judgment Dr. B. and the parties then went towards the door leading to the hall, judging from the spots of blood and the evidences of the struggle. When the blow in the left cartoid was struck; the Doctor and the person who struck him, were, I think, standing in front of the door a little on one side; that blow given when the Doctor was standing. If struck in the neck, and by a blow from a person standing in front intercepting him at the door, would be the natural manner for him to have thrown his head and neck away from the blow; that would account very satisfactorily for spots of blood upon the wall. The blood would not spurt until the dagger was withdrawn. A person of equal strength with Dr. Burdell could not have inflicted those wounds upon him with the resistance which would result without himself or herself having marks of violence. In the evening I went up to the house and was in Mrs. C.'s room. My suspicions were very much excited against her; observed her very closely, and when I left the room

shook hands with her on purpose to get very near her person; did not discover any marks of violence upon her. She had on a fur cape which dropped off from her shoulders; was acquainted with Dr. Burdell intimately, and I knew Mrs. C. professionally very well. I observed Mrs. C. closely because I suspected her. Through the day things occurred there that induced me to think that some person in the house committed the murder. I observed everything with especial care for that reason. As you go out of the door there was a spot of blood on the door sill; there is no question that the door must have been closed during the struggle. The drop must have got there after the door was opened; next observed traces of blood going down stairs, in the upper hall, on the right hand side, a place where a person going down stairs would naturally put his hands to the wall, if going down in the dark. On the base moulding, just back of the parlor door, on the right hand side, as a person would go towards the basement, there was blood, also a spot on the opposite side, by the mahogany railing on the base board, about the middle, right by the bannisters; the next spot of blood was on the door at the foot of the basement stairs, leading into the basement hall; on the basement front door there was a finger mark in blood on the hinge side, very much like a spot which one would have made feeling for the knob of the door with his fingers. I went into the basement; could not discover any blood there.

*Mr. Dean.* Will, you, in your judgment as a medical man, tell

the jury how the drops of blood in Dr. Burdell's room, to the south and west of the center-table, got there (referring to the spots on the floor near the window, and on the paper on the center-table)? They must have come from the person who committed the deed; they could not have come from the Doctor.

*The COURT.* Do you apply your remarks also to the drops of blood that you found in the hall, and on the stairs, and upon the basement? That was the conclusion I formed.

*Mr. Dean.* Would the clothing of the person who committed the deed absorb the blood, so that it would not drop from the clothing?

Objected to by the prosecution.

*The COURT.* You may ask him the question whether, if this blood was spurted on a person, it would be absorbed by the clothing?

*Mr. Dean.* If the blood was spurted upon the person, would it drop off the length indicated by these maps, which show the blood in the room and the wall? The blood would likely be absorbed by the clothing.

*Mr. Dean.* Can any opinion be formed as to whether these blows were inflicted by a right or left-handed person on the body of Dr. Burdell? The examination of the body was so miserably conducted that it is impossible to tell with certainty, in my judgment, whether the blows were inflicted by a right or left-handed person, for, in all cases of this kind, everything depends not only upon ascertaining the external position of the wounds, but also their direction and depth, and these things cannot be



accurately ascertained without a very careful examination; there are a few instances on record where such a matter has been determined, but it has always been with the greatest care, and by an accurate dissection, performed by very able men.

*Dr. Uhl.* At the time of the post-mortem examination I understood that the viscera, stomach and heart had been removed. With them removed, nothing satisfactory could be told by a probe. These blows were inflicted by a person who had a good knowledge of the human body. I never yet examined a body where there were so many accurate blows given. The party giving the blows must have had a pretty fair knowledge of anatomy. In nine cases out of ten persons attempting suicide hardly ever reach the artery, and fail to accomplish their object. I examined the neck closely, and made up my mind that the appearance about the neck and face came by lying upon his face during the entire night, with his head twisted a little to one side, caused by the pressure of the handkerchief. There was no appearance of it after the first day, and it all disappeared. An anatomical examination of the brain would have determined the ques-

tion of strangulation. It would have done so, if there had been any considerable examination. There was no anatomical examination of this body. The blow on the left arm was given as he held up his arm to ward off other blows. The blow would necessarily require a good deal of strength to give it force. The instruments which were shown to me last night could not have inflicted the wounds.

To *Attorney General Cushing.* Am the family physician of Mrs. Cunningham; the *post-mortem* examination was not done correctly; the object of this examination was to determine the external appearance of the wounds, their length and to decide if possible whether the knife which was shown the last night could have produced the wounds; that one part of it was not correct. We wanted an examination to determine the depth and length of the wound; cannot determine their direction and length by a probe; when that blow was struck, the Doctor did not have hold of anybody; in his struggles he held up his hand to ward off the blows; the furniture or anything in the room did not exhibit any evidence of a struggle; there was nothing upset.

The *District Attorney* said that he would now put in as evidence paper No. 11, found in Eckel's secretary. He read it to the court, as follows:

"In consideration of the settling of the two suits pending betwixt myself and Mrs. Emma Augusta Cunningham, I agree as follows: 1st. I agree to extend to Mrs. Emma Augusta Cunningham, and her family, my friendship through life. 2d. I agree never to do anything to the disadvantage of Mrs. Emma Augusta Cunningham. 3d. If I continue to occupy the premises No. 31 Bond street, I will rent to Mrs. Emma Augusta Cunningham the rooms she now occupies at the rate of \$800 per annum.

"HARVEY BURDELL."



The *District Attorney* then read the following admission in evidence:

"It is admitted that, on the 15th of October last, Mrs. Emma Augusta Cunningham, the present prisoner, commenced two actions against Dr. Harvey Burdell; one in the Superior Court of the city of New York, and the other in the Supreme Court; and that one action was for breach of promise of marriage, and the other for slander; that the defendant was arrested in each of the said actions, and held to bail in the aggregate sum of \$12,000; that both those actions were, on the 22d day of October, discontinued by agreement of the parties to said actions."

*Mr. Dean.* If your honor please, we have a motion to make. It is that this prosecution be dismissed.

*The District Attorney.* If the Court please, before any argument is made upon that, I must object.

*The COURT.* It is a very unusual proceeding.

*The District Attorney.* Excuse me, if your honor please, I will state my objection and then take my seat. The common law, and the statute based on it, provide that when two defendants are indicted together, and are on trial together—and such has been the law ever—a motion may be made to the court to instruct the jury then and there, at the termination of the evidence for the prosecution, that in the judgment of the court no case has been made out against one or other of the prisoners on trial, with the view of enabling the other party thus joined and thus put upon trial, to be put upon the witness stand and made a witness of. But, sir, when a party is alone upon trial, when a party is alone upon an indictment, and the prosecution rest their case, the jury must pass upon it, and the defendant may or may not put in his testimony. The case may go to the jury upon the testimony of the prosecution but I never heard of such a thing as a motion to non-suit in a case of this kind.

*The COURT.* I will hear the other side.

*The District Attorney.* Well, sir, I have a still further objection, and that is, under the guise of a motion to dismiss this case, which is either a legal motion or not, as the object is stated, that any argument should be heard.

*The COURT.* You will take your seat, sir; I deny the motion.

*Mr. Dean.* If the prosecution will wait till we state what the motion is—

*District Attorney.* I apologize to my learned friend on the other side. I heard him distinctly state that he would now move to dismiss the case.

*Mr. Dean.* Unless—

*The COURT.* So I understood him.

*The District Attorney.* But without any qualification. I deny the right of the counsel to make the motion under any qualification whatever.

*The COURT.* I will hear the counsel.

*Mr. Dean.* I have no doubt but that I can refer the public prosecutor to a case which he remembers very well, and in which this motion was not only made, but the action of the court was in conformity with it.

*The District Attorney.* By consent of the parties. You mean the Lutener case, in which Mrs. Hayes was the defendant.

*Mr. Dean.* No, not the Lutener case. Our motion is this, that your honor direct an acquittal of this prisoner, on the evidence as it now stands, unless the public prosecutor calls as witnesses Mr. Snodgrass, Mr. Eckel, Augusta Cunningham and Ellen Cunningham—parties who were in the house at the time of the homicide, who were capable of committing it, and who were witnesses before the coroner. I would say that this is far from being an unprecedented motion; that it is a motion that was made in the Austin case, before his honor Judge Edwards, in a Court of Oyer and Terminer, held in this very building, and granted. One of the witnesses happened to be in Illinois, and that was admitted as a sufficient excuse for not calling him. And if there is any question about this being a rule of law, I will refer your honor to the case of Queen v. Bowen, Carrington and Paine, where the public prosecutor took the same ground, viz: That he was not obliged to call everybody who might know about the case, and the judge who presided on that trial replied that the object of a criminal trial is not a conviction, but to arrive at the truth, and if the public prosecutor neglects to call those witnesses who are supposed to have a knowledge, or who are in a position where they, themselves, might have committed the offense, not themselves being indicted, the Court will put them on the stand and give to the defense the right to a cross-examination of them. Now your Honor will see the propriety of this rule. Here are persons who were in that house; there is no evidence in this case, and there is no pretense of any evidence.

*The COURT.* You need not discuss what the evidence is. It would not be proper on the ground on which you put your motion.

*Mr. Dean.* I put it upon this ground—

*The COURT.* Because if you are satisfied to let the case go to the jury, I can dispose of it in the charge I am prepared to give them.

*Mr. Dean.* The question is whether we have not a right to compel the prosecution to put those persons on the stand.

*The COURT.* If you will show me any authority which will satisfy the Court that it has a right to compel the prosecution to put witnesses on the stand, whom they do not see fit to place there, I will hear you. I should feel very unwilling myself to take the case out of the hands of the prosecuting counsel and the Attorney General of the State. I require a decision of the Supreme Court on argument for that. My judgment is that it would be an improper interference by the Court with the duties which the law has confided to others, who are responsible for the manner in which they discharge them. I am satisfied when I have discharged mine.

*Mr. Dean.* Then your Honor will not be bound by the authority of the Court of Oyer and Terminer?

The COURT. No, sir.

Mr. Dean. I can show an authority in England directly on the point.

The *District Attorney*. I will just say this, that in England there is, as many gentlemen know, a peculiar rule by which the King's counsel must call every witness whose name is indorsed on the indictment.

The COURT. Certainly, and there, too, all criminal prosecutions are prosecuted by private parties and not on behalf of the people, as they are here.

Mr. Dean. I am aware of that. The Attorney General, however, has to conduct the prosecution.

The COURT. No, sir; it is done by private counsel. The Attorney General is very often counsel for the defendant.

Mr. Dean. The question here is one of practice, and that practice we say is the practice of the Court of Oyer and Terminer. We come here and apply to have it followed up.

The COURT. I shall not do it in this case.

Mr. Dean. Well, we take an exception, of course, to that. Now we move to dismiss the case, on the ground that this court is not legally constituted.

The COURT. What is the ground of that motion?

Mr. Dean. That I merely state. I do not mean to argue it. We want it to merely appear properly on the record.

Mr. Dean stated his objection to the authority of the Court to be based on that law which required two aldermen to sit on the Court of Oyer and Terminer with the judge.

The JUDGE overruled the objection, and the *Counsel for the Prisoner* excepted.

Benjamin F. Maguire. Am a dentist, was acquainted with Dr. Harvey Burdell, and had often seen him write; am well acquainted with his handwriting.

(The *District Attorney* directed his attention to the papers found in Eckel's secretary. After examining them, he said that No. 1 was not in Dr. Burdell's handwriting; he thought No. 2 was; No. 3 did not purport to be in the Doctor's handwriting; No. 4 was not in his handwriting; the body of No. 5 was not, but the indorsement was in Dr. Burdell's writing; No. 6 was in his handwriting; the filling up of the printed lease (No. 7) resembled

the Doctor's writing, but witness did not think it was his; No. 8 was in his writing, as was also No. 9; Nos. 10 and 11 were also written by Dr. Burdell.)

Mr. Maguire. The revolver found in Mrs. C.'s room looks like the one I saw Dr. Burdell purchase four years ago; have often seen Dr. Burdell shoot with it.

Cross-examined. My mother and Dr. B.'s mother were sisters. We had a litigation and I was not on speaking terms with the Doctor at the time of the murder. Dr. B. and I had practice in his cellar with that pistol, shooting at a candle.

## THE DEFENSE.

*May 7.*

*Mr. Clinton.* Although not altogether unaccustomed to conduct capital cases on the part of the defense, I have never before risen to address a jury under circumstances like those surrounding this case, where, at the close of the evidence for the prosecution, the Court, the jury, and the counsel, one and all, felt that there had been a failure—an utter and entire failure—to point the finger of rational suspicion at the prisoner at the bar; that the prosecution—as if led on unwillingly and resistlessly by a gracious Providence—had proven beyond a peradventure, that the defendant was entitled to an immediate and triumphant acquittal. Let justice and humanity rejoice that the evidence of the District Attorney has forever silenced the batteries of his opening speech. My learned friend, as if he feared that a woman, who, since the 31st day of January last, has been hunted down as though she were a wild beast, would, when she came within the hallowed precincts of a court of justice, have exhibited towards her at least the outward forms of decency, saw fit, in advance of a word of testimony, to denounce her as the worst woman God ever created—a woman who you would think by his description had been commissioned by the monarch of hell as his special vicegerent on earth. I have often listened with pleasure to the addresses of my learned friend in capital and other criminal cases; but what was my surprise when I saw that he, usually so fair, so candid, so cautious, and so just, had overstepped all bounds of moderation, and, not content with stating the facts which he expected to prove, had ransacked the classics and traveled over all history, sacred and profane, ancient and modern, with the view of calling to his aid female fiends, as fit illustrations of the desperate and abandoned character of my client, with which to garnish his speech! However, gentlemen, that pelting storm of vituperation was fraught with one consolation; for if this defendant was ever

in danger, the opening address of the District Attorney has rendered her acquittal as sure that Almighty God shall permit you to live until you arrive at the end of your duties in this case.

In the brief observations I have to offer, I shall not go over all the evidence adduced before you, nor shall I, as the District Attorney supposed, seek to portray the sorrows which my client has suffered. He asserted that she came before you a veiled picture of sorrow—an arch-hypocrite—that the suffering she seemed to have experienced was entirely feigned. She does come before you a picture of sorrow; and, unfortunately, as she comes before you with the weeds of widowhood, truth forces us to concede that it is not the first time she has been called upon to deplore the loss of a husband. I will not attempt to depict to your minds the agony she suffered, when, scarce three years ago, the husband of her youth was laid beneath the sod. As she lay stretched upon a bed of sickness, herself about to cross the confines of eternity, as she believed, she was told that the thick shadows of death had already settled upon him—that his spirit had winged its way to a better world. She put her trust in the widow's God. Aye, she has faced affliction before, and come through it unscathed! Afterwards, rapidly but smoothly, she was borne down the stream of time, until dashed upon an epoch in her history of fearful moment. Suddenly there shone out from the horizon of her future, not the Star of Bethlehem, whose serene, hallowed light pierced the darkness of her affliction as the grave closed over the lifeless form of her husband, but alas! the star of destiny, which shed its baleful light upon the ill-fated union of herself with Harvey Burdell.

The District Attorney told you that she haunted that man for three long years, that she dogged him at every step in public and in private, that she was his persecutor—his tormentor. Gentlemen, has the District Attorney proved any such state of facts? I concede that he was in error—if you please, honestly mistaken. He knew not that Harvey Burdell sought her; that he importuned her with his attentions; that he courted

her; that he paid her every attention which an honorable man could pay an honest, intelligent, high-minded woman. There are those (and not a few) within the sound of my voice who know not only that she did not haunt him—did not seek him—but that he sought her—was profuse of his attentions to her—was ever ready to introduce her to his acquaintances, with whom he wished to stand well—to present her to the best and most respectable acquaintances he ever had. Aye! there are those present who know he was best pleased when he was heaping most honor, as he thought, upon her. Why did the District Attorney make that statement? Did he suppose he could prove it? Did he believe it was subject of proof? He did not expect, within the rules of law, as it strikes me, to prove anything of the sort. Yet, gentlemen, why should he—usually so fair—make a statement embittered with slander like that? Was it that he thought you would be influenced by declamation to disregard your oaths? I can hardly think that. Why was it? Let him, in his subsequent remarks, if he shall address you, inform you upon that point.

Before proceeding in reference to the facts of this case, I will take the liberty of inviting your attention to certain rules of law which the Court will lay down for your guidance. I refer the Court to 1 Greenleaf on Evidence, Sec. 13:

“In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases, it must exclude every other hypothesis but that of the guilt of the party. In both cases a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.”

In other words, the rule of law which governs you in this case, gentlemen, is simply this: Unless the circumstances proved exclude every other hypothesis than that of guilt, it is your bounden duty to acquit. This rule is well stated in Best on Presumptions, 282, which I will read:

“The evidence against the accused should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him.”

That is to say, if all the circumstances proved may be true,

and yet the party be innocent, you must acquit. If the circumstances are consistent with guilt or innocence, then you must acquit. In illustration of these principles, I will read from Judge Edmond's charge to the jury in the case of the People against Bodine (4th New York Legal Observer, p 93):

"Another rule is this: The evidence must exclude, to a moral certainty, every other hypothesis but that of guilt. If you can reconcile the facts that are proven with the belief or supposition that the prisoner is innocent—that somebody else committed the guilty deed—then that hypothesis which the law requires does not exist in your minds. To illustrate this matter—for I find that these illustrations are in my own mind more effective than abstract propositions—like the instance stated by counsel of the servant-girl indicted for the murder of her mistress. It was proved that she was alone in the house with the murdered woman—there were no signs about the house that it had been broken into—and from the fact that she had all the opportunities of committing the deed, it was concluded that she was the guilty person. One would have, indeed, supposed that every hypothesis but that of guilt was excluded. And yet in that very case, there was another hypothesis that was nearer the truth even than that which the jury had formed. A man had entered the house by an open window, to which he obtained access by means of a plank thrown across from the opposite side of an alley, and after he had perpetrated the murder he removed every trace of his entrance. The conviction in that case was therefore held to be wrong, because there was another hypothesis which the evidence did not exclude.

"There is another thing to be taken into account, that circumstances are sometimes fabricated by innocent persons falsely accused. Take the case of the uncle; he was heard chastising his niece severely; she cried out, 'You will kill me!' She was afterwards missing, nobody knew where she was; the uncle was strongly interested in her death, because he would have inherited her estate; he, alarmed at the circumstantial evidence against him, endeavored to save himself by dressing up another child and presenting it as his niece.

"That very fact was, as might have been expected, taken as strong evidence of his guilt. The man was convicted, and afterwards the child returned home, having run away from his severity. There can be little doubt that the fabrication of evidence by him operated most strongly in the minds of the jury in convicting him. Fabrication is also sometimes resorted to by those really guilty, to ward off suspicion from themselves. Take the instance of the man found on the road with the stolen horse. He was found alone with the horse, and could not give any satisfactory account of the manner in which it came into his possession, and on that evidence he was convicted. But it turned out that the real thief, finding himself hotly pursued and in danger of being overtaken, encountered this man on the highway, and asked him to hold his horse while he stepped into the neighboring



field, and thus escaped. The possibility of circumstances being thus fabricated, both of the innocent and the guilty, is therefore to be taken into consideration.

"Another rule is, that the supposition of guilt must flow naturally from all the facts, and be consistent with all of them. It must be no constrained result, and if any one of the facts is utterly inconsistent with the idea of guilt, it breaks the chain and bars the conclusion which might otherwise naturally flow from the other circumstances. As in the case of the servant-girl, accused of poisoning the family by food of which she partook as freely as any. The danger which she unnecessarily incurred was so inconsistent with the supposition of her guilt as of itself to be regarded as destructive of the conclusion which naturally flowed from other circumstances in the case.

"Another rule is, that in case of doubt, it is safest to acquit."

Gentlemen, I have quoted these rules of law, not because I believed any real necessity for so doing existed, but for the reason that the Court having not the power, as it has decided, to dismiss the case, it is incumbent on us to present it for your decision. We not only do not regret it, but we prefer that this course should be taken, although, as a matter of form, that motion was made to the Court. We prefer that you should dispose of this case, because we wish not only that Mrs. Burdell should be acquitted, but that she should be vindicated.

I shall first call your attention to the leading features of the case of the prosecution, relied on by the District Attorney in his opening, which he not only failed to prove, but which he has conclusively disproved.

Here let me premise that, had he proved everything he promised, a very insufficient case of circumstantial testimony would have been made out. He told you, with a view to show that the murder was the work of a woman, that Dr. Burdell was stabbed in an inartificial and bungling manner, not as a man would be likely to do it, but after the manner of a woman bent upon fiendish revenge; and yet the very first witness he called was that venerable man, Dr. Francis, whose countenance beamed with intelligence, a man of high standing, as you know, in this community, a very patriarch in his profession; and he told you that, in his opinion, the person who inflicted the wounds "had a good deal of anatomical knowledge."

You heard the testimony of Dr. Uhl, another witness for the

prosecution, and he testified that it was a very difficult thing for an anatomist to strike as accurately as did the assassin of Dr. Burdell. That such is the fact will be shown by a witness for the defense. Gentlemen, here ends that part of the District Attorney's case.

The District Attorney next stated that the body of the murdered man was laid out upon the floor of his office by the assassin, that the body was not found in the position in which Dr. Burdell fell. That was another circumstance from which he deduced an inference of guilt against my client. What is his proof upon this point? His witnesses, Drs. Main and Uhl, tell you precisely the contrary, and that, in their judgment, there was no evidence to show that the body had been at all disturbed.

Another circumstance which the District Attorney paraded before you was this: He said the defendant appeared the next day with a fur cape, and that she did so to prevent the discovery of a red mark upon her neck, corresponding to the mark upon the neck of the deceased—the mark which he asserted had been given in the death struggle. You recollect the rhetoric with which he clothed this pretended circumstance. What is the proof upon this point? He asked his witness, Dr. Mayne, “Did you observe anything about her neck?” and Dr. Mayne said, “No, there was nothing.” Further than that, gentlemen, he told you that it was a very cold day; that a fur cape was a suitable article of clothing for that day; that there was nothing unusual in the manner of this lady in reference to that particular, at all events. And thus falls the next important circumstance alleged against this defendant.

The District Attorney asserted that, on one occasion of great importance, the defendant directed her domestics to listen to altercations between herself and Dr. Burdell. I quote his language:

“She (defendant) with the sly cunning of her sex, took domestics into the room next door to his, and saying to them, ‘Now listen to the words that occupy the time between the Doctor and myself.’ Her spies, she thought. Ah! not so, thou artful woman—the spies of justice, who will be here today to tell what passed between you and

that dead man—to tell what passed between them—words so loathing that even the domestics shrank in horror back to the kitchen to remember well, for future use, what they had heard.”

The extract lacks at least one element of beauty, and that is truth. The domestics, although boiling over with rage against the defendant, all testified that no such facts existed. Away, then, goes this circumstance.

Another, and one of the most fearful circumstances alleged against this defendant, was, that she obtruded herself into the presence of Dr. Thompson, made known her quarrels to him, and sought to enlist him in her battles against Dr. Burdell. You heard Dr. Thompson’s evidence upon this subject; and he testified that exactly the contrary was true; that Dr. Burdell applied to him, and that Mrs. Burdell called and said that he had nothing to do with the matter. There was no reason why he should be drawn into it, and Dr. Thompson stated that he would have nothing to do with it, and the next day wrote a note to that effect.

These are the leading circumstances on which the District Attorney thought to convict this woman of the crime of murder! You perceive that his own testimony takes away from the prosecution all the circumstances he alleged against her, or at least the chief circumstances. I only call your attention to these matters briefly. A most extraordinary spectacle! Strange, indeed, that in a case like this the District Attorney should make such labored efforts to illustrate the supposed infernal characteristics of the defendant. In regard to the female recruits furnished by history and the classics, for the special benefit of my learned friend, in this case, I should say the female fiends conjured up from their dread, sulphurous abode by the District Attorney, for the benevolent purpose of disciplining the nerves of an Oyer and Terminer jury—let me say, once for all, that while it would be an easy task, as an offset to this hideous group, to present before you a galaxy of female excellence, by calling your attention to the heroines illumining history, and even to those whose Christian virtues grace the pages of Holy Writ, yet I shall make no at-

tempt of this kind, even though my address to you should be barren of illustrations of my client's virtues. If the District Attorney thinks that his course, in this regard, has promoted the cause of justice, he is welcome to any consolation he may have saved from the general wreck of his case.

I ask again, gentlemen, why was it that such a savage attack was made upon this defenseless woman? There is only one principle upon which I can understand it. You heard the witness, Dr. Maguire, state the feeling that existed between the different members of the Burdell family. You heard enough from him to draw the inference that Dr. Burdell was generally on bad terms with his family; that he quarrelled and made up with them by turns, and that they possess one peculiarity, which is very apparent on this trial. The moment the lifeless remains of Harvey Burdell are consigned to the cold and silent tomb, and even before, commences the scramble for his property. We know with what avidity his heirs, his blood relatives, have sought to snatch and divide up among them, whatever property he left. We know how they have hunted this unfortunate woman; and I know, also, that the very counsel of the members of that family who has appeared in the Surrogate's Court, in order, if possible, to make null and void her marriage with the deceased, so that they might get the property—that very counsel, although a worthy man and an able lawyer, appears here to prosecute this woman to the death. Gentlemen, you all recollect upon the Coroner's inquest, with what unmingled feelings of disgust was viewed the conduct of a certain lawyer who appeared there as counsel for the blood relatives of the deceased, and took part in that inquest. As you mingled with your acquaintances and the people in this city, and read the newspapers, you heard the universal condemnation of the course pursued by that man; you heard denounced the indelicacy, and indecency even, of his appearing as public prosecutor, and, at the same time, as counsel for those pecuniarily interested in the death of my client. Gentlemen, I can understand why this trial has been conducted in many respects as no other capital trial

has been conducted, only upon the principle that it is the handiwork of the blood relatives of Dr. Burdell, who have a large pecuniary interest in the death of the defendant. This interest can send counsel here with instructions to work up the case, angle for testimony, apply thumb-screws to witnesses, torture them as if upon the rack, and do everything in human power to send the defendant to a felon's grave, in order to grasp the share of the property which must otherwise fall to her, as his lawful widow. I can understand upon no other principle why the prosecuting counsel should travel beyond the record, and seek to be the channel of slanders, foul and hellish as ever fell from mortal lips—slanders, the truth or falsity of which is not to be tried in this court, because you are sitting only to try the indictment in this case. The District Attorney told you that this lady lived at 31 Bond Street, and, in effect, that she there kept a house of prostitution. He told you—and with burning eagerness he said it—that he would “unroof that house.” He attempted to tell you that she had forsaken one paramour for another; and he went on in that strain, describing her conduct for years as that of the most infamous woman ever suffered to go at large in this community; and yet, gentlemen, he knew that would not be subject of evidence—he knew that no such proof could be introduced in this case—that, whether true or false, it was wholly foreign to the issues before you. Yet he availed himself of his opinion as counsel to become the medium through which this diabolical calumny is to be disseminated throughout this community and scattered over the civilized world. I ask you, gentlemen, whether, as honest men, your very hearts did not sicken within you as you heard this infamous abuse heaped upon the defenseless head of the prisoner at the bar? Had my friend been an amateur, who loved to feast upon horrors, to tear and mangle character for mere sport, he could not have pursued a more effectual course for the gratification of such an unholy taste. I should have thought that one consideration alone would have restrained him. Was it a pleasure to him to stand up here before you, and while her

innocent daughters sat within a few feet of him—was it a pleasant task to travel beyond the record, and, in their presence and hearing, describe, in the terms he did, that mother, whose untiring and tender devotion to them has never slackened or diminished from their birth to the present hour? Was it a pleasure to him to take a course like that—an unnecessary, a vindictive, I had almost said a fiendish course? Gentlemen, I would have thought that one in whose veins flowed one drop of the milk of human kindness would have been restrained by humanity from unnecessary and uncalled-for abuse of the mother of those innocent daughters. Yet the gentleman could seek to influence your minds by such considerations. He seems to have thought them a suitable topic to descant upon, although not coming at all within the line of his duty. If he has gained anything by a course like that, I much mistake my reading of your countenances and my knowledge of human nature.

I call upon you, gentlemen, by your verdict, to administer a fitting rebuke, not only to the District Attorney, but to the relatives of Dr. Burdell, who have been thus vigilant in the pursuit of an innocent woman. In the madness of their sacrilegious zeal they would illumine this holy temple with the flames of persecution—with a live coal from off the altar of justice they would light the widow's funeral pyre! Let them remember that at the threshold of your duties, as you put your lips to the holy evangelists, your oath—at the command of the widow's God—was registered in heaven by the recording angel. That oath is here the sword of justice—that sword, through your instrumentality, is wielded by an omniscient hand. Hereafter, for a lifetime, let the solemn reality be engraven on their memory that, for her protection and their discomfiture,

"The brandished sword of God before them blazed  
Fierce as a comet."

Next in order I shall discuss various circumstances sought to be used against my client by the District Attorney, which circumstances have for their foundation either his unsup-

ported assertions or his distorted and disjointed views of his own evidence.

He told you that Dr. Burdell lived without enemies and without reproach; that my client was his only enemy, and the only person that could by any possibility have had any motive or opportunity to commit that deed of horror. I would that we could have been spared any allusion to the fact, but the unauthorized statement of the District Attorney compelled us, as far as practicable, to go into the subject with the witness Maguire. Truth compels me to state that Harvey Burdell had many enemies; that he was never in a house where he did not have his quarrels. You recollect with what flourish of trumpets the District Attorney challenged the defense to show who, except the defendant, had a motive for this murder—who but defendant could have done it—and, that I may not mistake his language, I will read from his speech:

“I shall greatly mistake your comprehension if you do not arrive at the conclusion that it was done by some person in that house, and by her who had a motive, who expressed the motive by threats upon the very eve of its consummation, who had the ability to do it and to conceal it—and having spread these facts before you we shall call upon our learned friends upon the other side to say, what of this motive? Who had a greater? What of this hatred and revenge and malice? Where is there another who had greater ability to do and to conceal? How could entrance have been obtained in that house? And if they shall fail in that, we shall claim hereafter, when the evidence which I have outlined shall be fitted together, to say that woman, whether she be called Emma Augusta Cunningham or Emma Augusta Burdell, whether she be the mistress or the wife, whether she had the simulated or the real marriage, that she—woman, though she is—was guilty of the crime.”

And yet, gentlemen, but a few moments ago, when we proposed to take up the glove thrown down by the District Attorney—to meet him upon his own ground and with his own witnesses—what did he say in your hearing? He objected to the testimony, and said, “This is a part of the tactics of the defense to put others on trial,” having previously told us, in effect, that if we did not do it our client should be hanged. He declared to you that great preparations were



made for the murder by the defendant; that no murder was ever more deliberately planned. Where is the evidence of that? Among the circumstances to which he alluded he told you that the defendant required Hannah to go to bed early on the night in question. And here the most innocent act is tortured into evidence—is made to form one link in the chain of evidence—showing guilt; it is alleged that it never occurred before—a thing likely to happen any night when this servant was in the house. She says it only occurred that night, and yet Mary Donohue, when it is necessary to prove something criminal which happened a few days before, said that Mrs. Burdell requested her and Hannah to go to bed a week before this, and that was the only time when such a request was made; thus one witness contradicts another upon that point.

Here is another circumstance: The District Attorney told you that there was a lock upon the door of 31 Bond Street—a mysterious lock—the like of which was never before made—that the mysterious lock was another link in that famous chain of evidence showing guilt—that my client had a key which opened that door, to which no other person had access. Yet, gentlemen, what becomes of the lock? The very maker of it shows you how it may be left so that the merest push against the door will open it; and Mr. Ullmann, this gentleman, as the District Attorney describes him, “honorable—against whom nothing can be said,” tells you that a simple wire would be sufficient to open it. At first the lock was a little difficult, and a plain key would not open the door, but when altered, a penknife was sufficient—you could almost blow it open. Yet we can pardon the manufacturer of the lock for having a great affection for it, and thinking it a very superior article.

Let me, in this connection, throw out a suggestion. Why did not the District Attorney examine the premises of parties who had the keys to that house? Will he for one moment pretend that he is ignorant of the fact that there were other persons who had keys to that house? I do not desire to cast

unnecessary suspicion upon any one. The District Attorney has failed to call these persons as witnesses. The testimony was before the Coroner, and if important for the defense, it shall be adduced here. I do not choose to mention the names of these parties at present. Why was it that no attention was directed towards any one save the defendant? Was it because the official, whose name has become a byword of reproach, knew not how to conduct an inquest? Was it because he, to save his own time, thought fit to charge the first man or woman he met with the crime and cease further inquiry? Let the prosecution answer.

The District Attorney tells you that the defendant stole Dr. Burdell's safe-key; and this is alleged to be one of the circumstances pointing to her guilt. No statement more false was ever uttered by mortal man. The District Attorney asserts that this key was found in the defendant's possession. Not so. It was found in an open attic among a large quantity of papers, where it was probably thrown by the deceased, he equally with the defendant having access to that place. At any rate, there is not one particle of proof, or well-founded suspicion even, tending to show that the defendant ever had possession of that key. That Dr. Burdell lost his safe-key is not disputed; but where he lost it does not appear. Yet the District Attorney would intimate that with this lost key the defendant opened Burdell's safe and abstracted certain papers. And yet, as though by a peculiar Providence, it has been made to appear that Burdell obtained another key, which thereafter he always had in his possession down to the time of his death. The papers in question were lost in September, nearly three months after the new had supplied the place of the lost key. Mr. Herring, who made the safe, and who supplied the new key, you recollect, swore that after the 28th of June the lost key would not open the safe.

The counsel for the prosecution tells you that at 31 Bond Street, on the night of the homicide, there was a mysterious smell of burned garments—intending, doubtless, to insinuate that the perpetrator of the murder burned his or her bloody

clothes, hoping thereby to consume all evidence of guilt. He introduced in evidence parties who, as they seemed to think, experienced an unpleasant nasal sensation in reference to burned woolen. I will not take up time with this matter. Suffice it to say that others, who had better opportunities, smelled nothing of the kind. Mr. Ullmann did not, and there is nothing to show that his olfactories are defective in strength or keenness. You know very well, gentlemen, that had clothes been burned there on that memorable night, the whole house would have been scented, even for a day or two afterwards.

The District Attorney says that Dr. Samuel W. Parmly discovered a flickering light in the attic of that house a little before eleven o'clock. That light, he would have you believe, sends a few straggling rays across this case. Here my friend waxes joyful at the thought that perchance he has discovered a faint glimmering of guilt. It is a curious coincidence—and I hope my friend, Mr. Oliver, will forgive me for mentioning it—that, last evening, two gentlemen were passing the house of this self-same, veritable Dr. Parmly, and in his attic window they discovered just such a flickering light as he described in his evidence. I do not suppose he was engaged in consuming by fire bloody or bloodless garments. There was nothing connected with the appearance of that pretended light at 31 Bond Street at that time which would be calculated to impress upon his mind any incident of the kind, had it occurred. We say it did not occur; but Dr. Parmly, in spite of our remonstrance, would bring in here that pet dog of his—his own King Charles—and, with the fidelity which belongs to his race, he was made to speak, in corroboration of his master, with all the force of canine eloquence. The doctor says he never went to another house in pursuit of that dog, yet a gentleman residing next door told me it was no uncommon thing for that dog to come there, and for Dr. Parmly to call for him and find great difficulty in getting him away.

I will not stop to discuss the peculiar mental composition

of Dr. Parmly. I wish to say nothing unkind of him. The reason I put him the question I did upon that subject was because his relatives had advised me that he possessed an imagination of such peculiar power that, after the lapse of a very short time, it was impossible for him to separate what he had imagined from what he had heard and seen. His own nephew, Dr. Ehrick Parmly, informed me—and, if necessary, he will be on the witness stand—that Dr. Samuel W. Parmly told him that he perceived the smell of burned woolen early in the evening—which was the time Burdell was assassinated, as he then thought—and it was with reference to this theory he fixed the time—and he failed to mention that he smelled anything of the kind afterwards. He tells you that the house was dark—that there was no light there except in the third-story window. The discrimination of a juror brought out the fact that Dr. Parmly paid no attention to the subject whatever; yet a moment before he stated that the only light in the house was the mysterious flickering one in the attic. This instance forms a small illustration of his peculiar mental condition. Even on this very night, so much were his nerves excited that when he saw two men in the street whose appearance had nothing brigandish, though they were not very elegantly dressed, he turned aside—he could not tell why, but he was confident he did not like their looks. When called upon to describe their movements, which struck him with such horror, all he could say was their walk alarmed him; and when asked what that was—whether it was fast—he did not know; whether it was slow, he did not know—he only knew that he was frightened.

The District Attorney told you he would prove that these parties lived on very ill terms. He has brought up the servant-girls—those who have been severely disciplined, for these long months they have been in custody as witnesses. They, as you saw from their manner, were hostile to this defendant—one of them discharged by her for drunkenness; the other, perhaps a good cook, but, from causes unnecessary to mention, decidedly unfriendly to her—these parties, arrest-

ed as witnesses, taken into custody by the Coroner, controlled by him, addressed in the most affectionate terms, made—aye, forced—to testify against their former employer—almost frightened out of their senses by their countryman, sitting in terrific majesty as Coroner—have only been able to testify to very few altercations, such as would be likely to occur between Dr. Burdell and any one who chanced to be in the house with him. Some of these occurrences never took place; others were grossly exaggerated by these witnesses.

Bear in mind, gentlemen, they stated that, with the exception of the few altercations detailed by them, the defendant and deceased were always extremely friendly. Now, what were these altercations? Hannah tells you that on one occasion defendant said to Dr. Burdell she would have satisfaction, or would be revenged. Officer Davis swore that he was called in on this occasion, and that the expression used was that she “would have satisfaction—would have his heart’s blood,” or words to that effect. Now, gentlemen, with reference to what was this language used, if it were used at all? It appears in evidence already that two suits were commenced immediately after that conversation. This language, if ever used, most unquestionably had reference to the satisfaction to be had from these two suits. You heard that the charge made by Dr. Burdell was that this lady had stolen a promissory note belonging to him, and that, in consequence of that charge, he called in police officers. Now, gentlemen, I wish you knew all the facts in respect to that matter. Dr. Burdell, without a shadow of foundation—for sinister purposes of his own—did make a charge of that kind in presence of Police Officer Davis. I will tell you what that note was. A considerable time before this, Dr. Harvey Burdell and his brother William were on ill terms, and suits were pending between them. At the same time, the wife of John Burdell—another brother—was seeking to procure a divorce, and William Burdell agreed to furnish the money for that purpose. He employed Mr. Edwards Pierrepont, a lawyer of this city, to prosecute that suit, and agreed to pay him. Mr.

Pierrepoint did prosecute it, employed associate counsel, and paid them out of his own pocket; yet, when pay-day arrived, Mr. William Burdell declined to keep his word and foot the bill; upon which Mr. Pierrepoint sued him, and obtained judgment. In the meantime some suits between Dr. and William Burdell had gone against the former, so that William Burdell held some judgments for costs against the doctor. These were in the hands of Mr. Pierrepoint for collection. Dr. Burdell then asked Mr. Pierrepoint to give him the judgment against William Burdell; and finally beleaguered him so that, in order to get rid of him, he told him if he would pay what he was legally bound to, he (Mr. P.) would make him a present of the judgment, on the express condition that he would never come near him again, and that he should never be called upon thereafter to speak to him. Under these circumstances, Mr. Pierrepoint, without any consideration passing at the time, gave him this judgment. Dr. Burdell, not willing to prosecute William in his own name, caused the judgment to be assigned to this defendant, and, as a matter of form, he took her note for the amount. Then, gentlemen, for reasons which, perhaps, it is not necessary to state, he did prefer the baseless, the false charge against her of stealing this note, perhaps for the very purpose of getting rid of her. She, at once indignant, as any high-minded woman would be, that such a charge was brought, spoke probably in terms of excitement. Could an innocent woman do less? She did immediately afterwards have her satisfaction. Burdell had agreed to marry her; he had introduced her into society as his intended wife. Their engagement was known among their mutual acquaintances; she was looked upon as the future Mrs. Harvey Burdell. When this infamous charge was made, her indignation was so far aroused that she invoked the aid of the law in her protection. She immediately commenced against him one action for slander and another for breach of promise of marriage in which he was held to bail in the large sum of twelve thousand dollars. You can imagine, gentlemen, what must have been the affidavits be-

fore the Judge to induce him to require bail in so large a sum. These cases were of a very grave character, and but for a subsequent settlement would have been vigorously prosecuted. I venture little when I say that no jury in either case would have failed to render a verdict for a large amount. I have no doubt, gentlemen, that had the defendant been disposed to prosecute these suits—had she been in pursuit of Dr. Burdell's property—she could have obtained verdicts which would have yielded her more money than her share of his property, now that she is his widow. Those suits were immediately settled. But how settled? Burdell then concluded to repair the grievous wrong he had done. The suits were discontinued upon the express understanding and agreement between themselves that within a certain number of days—six or ten, if I recollect aright—they should be married. Within the time specified they were married, and thus were settled those two suits!

Now, gentlemen, I ask you whether that kind of proof tends to show that the defendant perpetrated the murder? Cannot you understand that in the intercourse of a year or two parties may have their altercations, and bandy idle words and threats, and yet no serious meaning attach to them? I do not believe that this lady ever used the expression to which Officer Davis testified; and, mark you, he is particular not to say that she said she would have Burdell's heart's blood, but that she said that, "or words to that effect." He does not pretend to recollect the words, but gives his idea of satisfaction. He does not know to what she alluded. It is natural that he, in view of subsequent events, should draw the conclusion that she said she would have his heart's blood. Yet, gentlemen, no such threat was ever uttered by her. The words she used were, in substance, that she would invoke the law in her aid; that she would have that satisfaction, which she subsequently did.

But the counsel for the prosecution talks about another difficulty; he even points to three or four altercations in the course of a year, to one of which Mary Donohoe testifies.



After she had been there about a week, she says, these parties had some conversation together; that Mrs: Burdell came out of the room where it occurred, and said to her that it was in relation to the woman Hubbard. Now, were that true, would it prove anything? At this time defendant and deceased were married. As to the character of this perhaps you have heard enough already. You have learned that she was accused of being the kept mistress of her own blood cousin. You have heard, and we can prove the fact, if the Court will let us, from Burdell's own papers, in his own handwriting—which papers are in the hands of the Public Administrator or the District Attorney—that he procured her divorce from her lawful husband, paid the expenses, and afterwards, as we are informed, kept her as his own mistress. Is there any blame imputable to this defendant? The “head and front of her offending” is that she refused to permit her husband's mistress to reside with him—with herself—with her children. Yes, her nature, in all the majesty of womanhood, revolted at the thought of the exposure of her pure, innocent daughters to the contaminating society of Hubbard. Had she done otherwise, what vials of wrath would have been poured upon her devoted head by the District Attorney! To what torrents of invective she would have been subjected! Here, gentlemen, I beg you, forget not that after this this woman never did return to reside under the roof of Dr. Burdell; yet she came there often to visit him—the defendant could not prevent this—for what purpose your discrimination will at once detect.

A conversation at the breakfast table, when the defendant was present, has been trumped up as evidence of hostile feeling on her part. It is said that Eckel—as innocent and harmless a man as ever appeared in human form—made a remark like this: “By jingo! I would like to be by when he is strung up, if I didn't have to pull too hard at the rope.” In the first place, the girls are mistaken about such a conversation having taken place. That some uncomplimentary allusion to Dr. Burdell, on the occasion in question, was made, is quite

probable, as you will understand upon a narration of the circumstances. A few nights previous, or the night before, Dr. Burdell came home as late as one or two o'clock. He had his night-key, but could not get in; it was at the time the lock to the front door was out of order, and a night-key would not work, except with difficulty. He rang the bell with great violence, and awoke Hannah, who requested Snodgrass to go down and open the door, which he did, as a matter of kindness both to her and the doctor. He immediately began to abuse poor Snodgrass. According to the testimony we will produce, he said: "I'll knock your brains out—I'll dash your head in, G—d d—n you! Why is this door bolted? If ever it occurs again, I'll do that." Snodgrass was somewhat surprised that Dr. Burdell, instead of thanking him for his kindly offices, should use such language. All must admit that Burdell treated Snodgrass very rudely on that occasion; yet Snodgrass never resented it, as far as I can learn. Some reference to this was probably made next morning at the breakfast table, when the opinion was expressed that Dr. Burdell was entirely wrong in using such violent language under such circumstances. That language is perhaps the best commentary that can be given of the utter meaninglessness of such threats. Do you suppose that Burdell, when he said he would knock Snodgrass's brains out, intended to put the threat in execution? Does a single day pass without your hearing such threats as "I'll knock your head off!" "I'll sweeten you, if you do such and such a thing!" "I'll kill you!" or the like? Although such idle and meaningless threats are made every day, yet if Snodgrass had been waylaid and garroted, that threat would have been convincing proof, according to the theory of the prosecution, of the murderous design of Dr. Burdell!

Here is a fact of great importance, which should be borne in view throughout this trial: notwithstanding Burdell was so irritable, violent, and possessed such an unhappy disposition, with a very few exceptions—mostly of a slight and trivial character—he and the defendant dwelt together in har-

mony. Does not this fact speak more loudly in her defense than do these frivolous quarrels against her? I will not dignify this branch of the case by descending further into details.

The public prosecutor avers that the conduct of the defendant, after the death of Dr. Burdell, showed conscious guilt. A single expression of hers has been criticised with great severity; and the District Attorney has sought to torture it into an appearance of guilty knowledge respecting the assassination of the deceased. The District Attorney told you that the defendant remarked to Dr. Mayne, when he informed her that Dr. Burdell had burst a blood vessel, that it was a relief to her to know that he had not been murdered. Why did she speak of murder? asks the gentleman. Had he forgotten that the servant-girl who first conveyed the information to her that Burdell was dead told her that he was murdered, as she feared? When Dr. Mayne came in she stated to him that, from what Hannah had said, she feared Burdell had been murdered. Why should the District Attorney thus seek to distort the evidence? Does he think that the ends of public justice will thereby be subserved? But, says the District Attorney, the defendant, on receipt of this information, did not rush downstairs immediately. Had she then gone into the room which contained the corpse of her husband, my friend would have said that her conduct was hypocritical. Any emotion she might have exhibited in that trying moment, on viewing the mangled and bloody corpse of the object of her affections, the District Attorney would have stigmatized as "acting." It is a maxim of law that impossibilities shall be required of no one; therefore, we are under no obligation to please the District Attorney. But, whether he be pleased or displeased, I ask you if there was anything unnatural in her conduct? Remember, there were her daughters, the youngest at home, Miss Helen, having fainted; Miss Augusta, hysterical; herself laboring under violent hysterical excitement; people in great confusion rushing into the room;—would you expect that she, under such

circumstances, could sit down and coolly calculate upon the best line of conduct to pursue with reference to the possible contingency of being accused of murder?

The next charge is that she refused to testify before the Coroner, that she would not even come into the room containing him and his jury, without the advice of counsel. I had not seen her at that time. You must remember that she had been already arrested. Yes, in defiance of law, she was taken into custody by the Coroner about the middle of the afternoon of Saturday. She, knowing that her marriage with the deceased had not been published to the world—for it was not to be made known until the following June, when Burdell was to give up his business and take her to Europe—she, knowing this, and especially in view of her arrest, might, without impropriety, desire to consult counsel. No evidence of guilt could fairly be deducible from such a circumstance. You must recollect that the Coroner's treatment of her and her family, which has fixed such a lasting disgrace on the very name of Coroner, had already commenced. Had she, under these circumstances, refused to testify until she had advised with counsel, her conduct would have been quite excusable. Yet such was not the fact; conscious of her innocence, she shrank from encountering, face to face, even that Coroner. She went immediately to the room where he and his jury were stationed and gave her testimony. It was marked with candor and fairness; and, if there be anything in it which conflicts with the testimony of Hannah Conlan or Mary Donohue, I should be sorry to see any juror take the testimony of either, or both, in preference to that of this lady.

But, says the District Attorney, she afterwards refused to testify. By this time the course of the Coroner in regard to this defendant was pretty well developed. He had devoted his untiring and sleepless energies to the task of fastening guilt, or at all events suspicion, upon the prisoner at the bar. He had converted 31 Bond Street into a prison for her and her family. He refused to accord her the privilege ordi-

narily extended to the vilest of criminals—to-wit, the right of seeing and consulting with friends and counsel. With such a high hand did he carry on this crusade against the rights of my client that it was necessary to apply for relief to a Judge of the Court of Common Pleas of this city. With a view to enforce my rights, with a view to enforce the rights of the Bar, with a view to protect the rights of this lady, I was compelled to apply to Judge Brady for a writ of *habeas corpus* to bring her down to the City Hall in order to obtain an interview with her. I then demanded to know whether the Coroner held my client as a witness or as a party. Although at first, with characteristic zeal, the Coroner stated, in his return to the writ, he held her in both capacities—as party and witness—yet upon being compelled by his Honor the Judge to elect, he finally resolved to hold her as a party. I previously stated in open Court that if he held her only as a witness, he might take her testimony; he might examine her as long as he pleased; but that if he held her as a party, his enthusiastic eagerness, his excruciating anxiety to use her as a witness were doomed to disappointment. Our law forbids, humanity forbids, common decency abhors the spectacle of the examination of a party in a criminal case as a witness against himself or herself. Yet in this particular case, believing fully, as I did, in the innocence of my client, knowing she would not object to being examined as a witness before any fair magistrate—she even desired to be examined before the Coroner—if there was any fault in her not being examined before him, it was mine, and mine entirely, because, notwithstanding her wish, I told her that I would not, so long as I was her counsel, allow her to be examined before that man; yet, as I said, so entirely was I satisfied of her innocence, and that she had nothing to fear and everything to gain by such a course, that I stated to the District Attorney if he would take her before any fair magistrate—and he had a perfect right to do so—I would interpose no obstacle to the taking of her testimony. I even told my learned friend that he was at liberty to call her before the Grand Jury, and

I would advise her to answer any and every question that he might put to her. I thus freely tendered her as a witness. My objections in her particular case were personal to that Coroner.

There is another portion of the District Attorney's address I must not forget. His whole speech excited no little surprise on our part, but we were taken by storm when he intimated that he had within his grasp almost an eye-witness of the murder. He said:

"By every hypothesis, it was the hand of some one who knew that house—who had time to stay; and in that room back there sat a silent watcher, a sick man, and saw the form of some one in there—a man whose evidence has never before been given to the public, and though it forms in itself the essence of a very small circumstance, it shows conclusively to the mind of the prosecution that there was no haste about that thing; that it was deliberately followed up as it had been deliberately planned, and promptly and efficiently executed."

Where is that "silent watcher"? We watched in vain for his appearance on the witness stand. Our sympathies are warm and generous towards that "sick man." Where is the evidence that "he saw the form of some one in there"? Whose form did he behold?

But enough of the unredeemed promises of the District Attorney! His alleged evidence against the accused vanishes at the touch into thin air. The chain of circumstantial evidence he sought to forge with which to bind my client to the scaffold becomes but a rope of sand.

I shall now present to you some further considerations, growing out of the evidence of the prosecution, establishing the innocence of the defendant.

The District Attorney told you that whoever murdered Dr. Burdell was covered with blood. I will quote my learned friend's language:

"Whoever did that deed was, in all probability, covered from head to foot with blood; blood upon the dead walls; blood upon the dead doors; blood upon the dead furniture—no figure of romance when the advocates speak about a pool of blood around the weltering dead corpse—little marks of blood upon the carpet, drops that had fallen

from something—from the bloody dagger, from the bloody sleeve—from the bloody form.”

Do you suppose that whoever perpetrated that deed could have done it without thus becoming covered with blood? Would not the bloody finger-prints—the bloody marks—have been made wherever that person went? Here, remember, that instant possession of the house 31 Bond Street was taken by the Coroner and the police; that the whole house was searched—searched from cellar to garret—outhouses searched—even the premises of Eckel were searched. All in that house—all in the employ of defendant—all who were acquainted with her—nearly all who had ever seen or heard her—as far as the Coroner could ascertain—were called as witnesses, and an examination, extending over two weeks’ time, was had in respect to the matter. Blood was found upstairs; and the theory was, that the assassin had taken that direction. There was blood upon the clothes up there; and that was subjected to careful analysis. It was demonstrated that it was menstrual—not venous blood. And that theory was overturned. The dresses—I ask your special attention to this—the dresses of all in that house—of the mother and daughters—all their dresses were examined by chemists. The police also examined them. Every little spot was subjected to chemical analysis, with a view to discover blood. Every pear-juice stain, even upon the dresses of the children, was subjected to a chemical analysis. Yet the result of this police search—this scientific search—for blood, revealed nothing adverse to the inmates of that house. This fact should have spoken trumpet-tongued in their defense. Had they, or any of them, participated in that terrible crime, could they so speedily, under such circumstances, have removed entirely all bloody trace of their guilt? The idea is preposterous.

The District Attorney stated, in his opening, that the homicide was perpetrated by a left-handed woman. His language was (in speaking of the manner in which the murder was accomplished):



"But whether struck here or there, this one damning fact will come out, that whoever struck that blow was probably a left-handed woman; and she, left-handed, carefully watched in the prison to see it, and the domestics of the family swearing so."

Where is this vaunted evidence? Not a scintilla of proof has been introduced to show that the defendant is left-handed. The fact is otherwise.

The District Attorney tells you that when the assassin was plying the murderous dagger, Dr. Burdell fought with the "desperation of a whole army"! Do you suppose that woman (pointing to the defendant) whose arms and hands are, to no inconsiderable extent, enfeebled by rheumatism—a woman of very little physical power—possessing not a fourth—scarcely a tenth—of the muscular power of Burdell do you suppose that she, alone, could have grappled with him, or that she, in company with others, could have participated in that foul deed, and leave no trace of crime? Impossible! Absolutely impossible!

Here, bear in mind, some of the District Attorney's medical witnesses state that the fatal blow, which severed the carotid artery, was struck from behind. Suppose it was! The direction of the stream of blood which spurted forth when that blow came, as now appears upon the wall, shows beyond all question that Dr. Burdell stood erect. The blow which severed the carotid artery went downward; and it is just as plain as the sun at noonday that if that blow were given as the prosecution's witnesses say it was, it was inflicted by a strong, muscular man—a man much taller than Harvey Burdell. The fact is susceptible of demonstration that, from the position of the parties, Burdell stood erect; and as the jet of blood corresponding with his height shows, this blow was inflicted downward. You can see at once that it must have been given by a man much taller than Harvey Burdell, and by a man of great muscular power. It was a blow which required great force in order to do the execution it did. Further than that, gentlemen—and I ask you to give to this your careful consideration—that blow, in all human probability, was given by one possessing anatomical skill.

The physicians tell you that it would be a difficult matter to plant blows as effectually as did the assassin on this occasion; for you will recollect that not only was the carotid artery severed, but that a stab through the heart was also given. There is scarcely a surgeon in town who, in a struggle of this kind, could strike at vital parts with such deadly effect. A tall man must have done this deed—a man possessed of medical skill. Who is that man? We are not public prosecutors. All information within our reach has been furnished the District Attorney. All that we know, he knows.

Gentlemen, it appeared before the Coroner's Jury that various other parties saw Dr. Burdell on the day of this murder; that among them there was but one individual who had an appointment to meet him that evening, and that that individual saw him late in the afternoon. He was the only living man who had a business appointment with Dr. Burdell, as far as the testimony before the Coroner showed, on the evening it is alleged he was killed. Why has not that man been called? I read from my learned friend's address to you: "I pray your attention to that—who had watched him on Friday, who had watched his conversation with Dr. Cox—who will be upon the stand—and with Dr. Blaisdell—who will also be upon the stand—who was watching his coming?" Why have not both of these witnesses been produced? We had hoped to see them upon the witness stand, as we had certain questions—not uninteresting—to put them.

But, says the District Attorney, prove who had a greater motive to commit this crime? If you do not, the rules of law should be reversed, and this defendant should be found guilty. The rules of law reversed! It is a strange spectacle to behold the public prosecutor—a sworn officer of the law—call upon you to reverse the rules of law! which is, in effect, asking you to violate the law. Hang the defendant, unless she will prove who is guilty! If she be innocent, how can she tell who is guilty?

So much for the testimony of the prosecution. The evidence of the District Attorney, which he thought would form

a rock on which my client was destined to founder, has proved to her a Gibraltar of defense. Even in his labored attempt to fasten suspicion upon her, "his reasons are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them; and when you have them, they are not worth the search."

I shall now call your attention to a few additional facts connected with the testimony of the defense, establishing, affirmatively, the innocence of the defendant—demonstrating the impossibility of her guilt.

We have determined to go into a defense, not because the slightest necessity of so doing has been imposed upon us by the testimony of the prosecution, but for the same reason I was willing to tender to my learned friend my client as a witness, I am willing, ready—aye, anxious—to go into a defense.

Our evidence will show that immediately after the death of Burdell no wounds were upon the person of the prisoner at the bar. I have already alluded to the assertion of the District Attorney, that a mark was found upon her neck, as though she had been engaged in a death grapple. Had she been so engaged, not a few wounds would have been upon her person, all speaking in unmistakable language of her participation in that dark and foul deed. Were any such wounds upon her person? Was there anything to indicate that she had taken part in that horrible crime? That matter was investigated. Her person was examined. In defiance of law—in defiance of humanity—in defiance of common decency—her person was examined! Yes, there were men, under the control of the Coroner, at 31 Bond Street, who perpetrated this foul outrage! Suspected as she was, had the examination been conducted with decency, and by her own sex, we never would have expressed the first word of complaint. But the Coroner took it into his wise head to act as though he thought her guilty, and that an examination of her person would show wounds upon it, and thus demonstrate her connection with the death of Burdell. Hence, that examination

was ordered; and although the result is such that we are bound to introduce it here, as showing her innocence, yet the manner in which that examination was performed—by men, . . . a policeman and physician being present—was such as to strike you with unutterable disgust and loathing. You can understand me, gentlemen, when I say that this woman has been ruthlessly deprived of her rights. It was not enough that she should be locked up as a prisoner in her own home, afflicted as she was, the second time a widow, her husband having met his death by violence, which plunged her into the deepest abyss of grief; all that was not enough; but a fiend—to use the classic language of the District Attorney—a very fiend, who called himself a Coroner, must take it upon himself to see that her person was stripped, as naked as she came into the world, and examined, with a view to discover marks of violence! Yes, to his everlasting condemnation be it spoken that he ordered and allowed this to be done by men! Yes—a mother of five children—her grown-up daughters ready to be married—was ordered and compelled to expose her person! I need not inform you that the Coroner had no legal nor moral right thus to proceed; although (I repeat) she would have consented to the examination of her person by women. Had he sent for the matron of the City Prison, or any respectable woman, to perform that examination, no complaint would have been made.

Gentlemen, if ever there was a woman whose feelings had been outraged, and who was entitled to sympathy at the hands of a jury, it is this woman, now a prisoner at your bar. I know not why the District Attorney should have said that she was disentitled to all sympathy at your hands. He called her a “tigress.” Had she borrowed the strength of a tigress and clutched by the throat the perpetrators of this outrage—throttled them—till life left their bodies, she would have been acquitted of all blame at the hands of a humane and indignant jury. Let them rejoice that she, armed by the law of nature, by the law of the land, with the right of self-defense, with the right of defense of her person, did not

shoot them down. In this matter the Coroner has done enough to secure for himself an immortality of infamy—enough to send his name down to the latest posterity freighted with loathings and execrations.

Yet, gentlemen, there was no wound—no mark—no scratch—found upon her person. That fact alone would be sufficient to demonstrate her innocence. The District Attorney has charged that she did the deed, that she participated bodily, and that is the issue you are to try under this indictment. He cannot, in any point of view, ask a conviction, unless you find that she was present, aiding and abetting in the homicide and in person took part in the encounter. This branch of the evidence alone establishes the proposition that the prosecution have not only failed in proving anything necessary to make out their case, but have proved a complete defense.

We shall introduce another item of evidence, which, in the minds of the whole community, will remove the only ground of suspicion that ever existed against this woman. When this community was first startled with the news of the murder, the almost universal inquiry made was: How could such a homicide be committed in the house in question without the knowledge of its inmates? How could it be that they heard no noise? I will tell you. The construction of that house is such that, with carpets down and doors shut, it is an utter impossibility, in the room occupied by Mrs. Burdell and her daughters, to hear a scream, certainly a much less noise, such as Dr. Burdell probably made. The walls and floors are very thick; we will give you the dimensions. I and my associate, in company with Drs. Uhl, Dwinelle, Roberts, and Mr. Abbott, occupied two hours in making experiments at 31 Bond Street, with a view to ascertain whether sounds made in any one room could be heard in any other room on the floor above. One portion of our force was stationed in the room occupied by defendant and her daughters, while the others were in the room where Dr. Burdell was killed. Those in the latter room fell upon the floor with the greatest possible violence, at the

same time shouting "Murder!" and "Halloo!" as vociferously as human lungs would permit. Not a sound could be heard in the former room; not a sound was heard, with the exception of a faint sound of "Halloo," or, rather, a very faint sound of the "o" in that word. It was so faint that in Mrs. Burdell's room it was not possible to tell whence that sound proceeded. Here, then, you have it demonstrated that when Dr. Burdell was screaming or shrieking, if he did scream or shriek, the sound could not, by human possibility, be heard in Mrs. Burdell's room, unless by some one on the watch, with the door open, listening.

During the continuance of these experiments, I suppose we shouted "Murder!" at least fifty times. We cried aloud; we shrieked for help; we begged for succor; we sent up loud, long, and piteous wails of distress, enough to melt the hearts of savages; yet no one came to our relief; people were passing to and fro in the street continually; the adjacent houses were lit up, filled with occupants. Although we were thus turbulent, created more noise than would have been occasioned by scores of murders, yet the neighbors, the police, the passers-by—unconscious of our perils—left us to perish, to die all sorts of horrible deaths! You recollect that the District Attorney stated to you that the inmates of that house, and especially the occupants of Mrs. Burdell's room, must have heard the noise in Dr. Burdell's room at the time he was killed. You can now understand that this was impossible. This must forever remove from the case the only ground of suspicion which ever attached to it in the public mind.

We shall place on the witness stand the inmates of the house 31 Bond Street, and shall prove by them the impossibility of defendant's guilt. Here let me ask, in all earnestness and sincerity, why the District Attorney has failed to call every material witness examined before the Coroner? He has left out of his case nearly the entire body of the evidence introduced before that unique and redoubtable functionary. Snodgrass was examined several times, and at great length. The daughters of this lady—aye, and her little sons,

nine and ten years of age—were all made to testify before the Coroner—were all called to the stand as witnesses against their mother. They testified under circumstances calculated to make the stoutest heart quail, calculated almost to disturb even a soldier's nerves. The daughters were subjected to an examination, or, rather, an adroit and subtle cross-examination, whose merciless severity was almost without parallel in the annals of criminal jurisprudence. All this was done for the sole purpose of extracting from their lips evidence of their mother's guilt. Those little boys were forced to pass through the same ordeal. Remember that each was examined in the absence of all the others, in a room densely packed with spectators. I recollect well, in reading that evidence, the peculiar nature of the questions put to those artless boys. These are fair specimens:

"My little son, what time was it when you heard the noise last night?"

"What time was it when you heard the struggle;"

"What did your little brother say to you about the noise he heard, when he woke up?"

In that artful way it was sought so to entangle them with leading and complicated questions as to extort from them what was not true. However, they, unattended by their mother, unattended by their sisters, unattended by counsel, with no familiar faces about them, fronting a gaping crowd, answered every question put to them, in the simplicity of childhood. It was apparent to all that every word which fell from their lips was truth itself. Yes, gentlemen, those noble little boys could not be terrified, even by the Coroner's stentorian voice, in which he launched forth huge interrogatories, into telling aught but the truth.

I ask again, and you will ponder this well, why has the District Attorney, with one exception, left off the stand every person who was in that house on the night of the homicide? He required Snodgrass to give bail in the sum of two thousand five hundred dollars for his appearance on this trial as a witness for the prosecution. Why has not the District



Attorney called him? Will not the truth answer his purpose? Does he suppose that all the inmates of that house were privy to the murder? Can such an astounding and horrible thought find a resting-place in his mind? I cannot, I will not, impute to him so monstrous, such a diabolical absurdity.

Gentlemen, you are aware that the theory presented during this trial is, that Dr. Burdell was killed after ten or eleven o'clock at night. We shall place before you, as witnesses, the children of this lady, as well as Snodgrass. We will prove her whereabouts during that day and evening. We will prove to you that, in company with her daughters, Augusta and Helen, she retired to bed that evening long before the murder was committed; that all three slept in one bed, the mother sleeping between the other two; that the mother, after so retiring, did not leave her bed until after sunrise the next morning. Her whereabouts, every moment of the time during which, it is alleged, the homicide was committed, will be shown by evidence, as credible, as pure, as truthful as was ever given in a court of justice. This will establish the absolute impossibility of the defendant's participation in the crime with which she stands charged. I will not stop here to allude to the charge against the eldest daughter of my client, sought to be conveyed by the District Attorney in his opening, by a vague and shadowy insinuation. I will not so far insult your understanding as to take a course implying that I suppose you consider any answer to that attack necessary.

I have thus gone over nearly all I intend to say in relation to this case. I have felt it my duty to discuss its merits as thoroughly, as if I considered my client in real danger. You will appreciate my position when I say I have endeavored to discharge my whole duty; whether with benefit to my client is for you to determine. I trust you will believe I have done something towards carrying out the intention I expressed at the outset of my observations, that Mrs. Burdell should not only be acquitted, but vindicated.

This is not merely a struggle for liberty—not merely a struggle for life—we battle for character, without which life is but a withering curse; life without character is as the body after the soul has fled.

“It is as if the dead could feel  
The icy worm around them steal,  
And shudder as the reptiles creep  
To revel o’er their rotting sleep,  
Without the power to scare away  
The cold consumers of their clay.”

The future of Emma Augusta Burdell not alone hangs upon your decision: five children—as bright jewels as ever studded the diadem of woman’s pride—must share her glory or infamy. Your verdict must illumine their future with the serene and hallowed light of innocence, or shroud it in darkness darker than death. Must her little sons receive nought but a legacy of shame? Must it be told them, when they grow to manhood, that their mother was deluged in crime, that their sisters were monsters of iniquity, that what should have been the temple of domestic purity was but the charnel-house of moral death? Ah! better for those sisters that the stiletto, bathed in their heart’s-blood, should record the death of the body than that your decision should appear as a moral guillotine to sever the vital principle of integrity from their being—aye, a hundred-fold better, than that your verdict should be to them an index-finger upon the guide-board of life’s pathway, pointing to the grave of all their hopes!

When listening to the eloquence of the District Attorney, to his reference to ancient and modern classics, to ancient and modern history, to the sketches he drew of desperate women, I remembered that in those times there existed a crime which sapped the very foundation of law—a crime which festered and gangrened in the God-defying action of those into whose hands, for a time, was committed the administration of public justice—a crime so baleful in its consequences, so towering in guilt, as to almost bury in insignificance every other offense—that crime was judicial murder! It existed when juries convicted of capital offenses in viola-

tion of law, and in defiance of evidence. Thank God, those days have passed! I have no fear that you will attempt the restoration of that crime, notwithstanding the manner in which the District Attorney has conducted the prosecution:

Gentlemen, I know the defendant has nothing to fear from you, the chosen ministers of the law, armed as you are with the sword of justice to prevent the success of perjury and the execution of designs festering in malignant hate. You will rejoice that duty does not require—but forbids—you to throw over my client, her family—one and all—the mantle of infamy whose black and cumbrous folds would envelop and entangle them in all the varied windings of the labyrinth of life. You will rejoice in the opportunity to vindicate the widow and the fatherless—to show that in a court of justice, come what may, their rights shall be protected. When the time shall arrive—as it will speedily—for you forever to end this case, I venture to say the pleasantest duty which ever devolved upon you will be to pronounce a fearless and truthful verdict of not guilty.

#### THE WITNESSES FOR THE DEFENSE.

*Rev. Luther F. Beecher.* Reside at Saratoga Springs; am a teacher, and of the Baptist denomination; knew Dr. Harvey Burdell, and became acquainted with him at Saratoga Springs in June, 1856; knew the prisoner at the bar; became acquainted with her at Saratoga Springs on 26th July last; Dr. Harvey Burdell introduced her to me at the depot in Saratoga Springs; she boarded at the same house with me three weeks; saw Dr. Burdell at Saratoga two or three times during that time; was not certain where he boarded; saw him at the house where Mrs. Burdell boarded; on one occasion they rode out together, and I put them in the carriage; a daughter of

Mrs. Burdell is now in my school; the house in Saratoga where Mrs. Burdell boarded was attached to the institution as a boarding house for the pupils; during the summer vacation, however, it is used as a boarding house for visitors; Mrs. Burdell's daughter went to the school in the last week of September last, and has been there ever since; her name is Georgiana; was in New York on Friday, the 30th of January last, and was at No. 31 Bond st. on that day, at about one o'clock; saw there Mrs. Burdell, Miss Van Ness, Dr. Burdell and a boy who admitted him; Dr. Burdell came in after I entered; when the Doctor came in there was no one in the room except

Mrs. Burdell and me, and I noticed nothing in the Doctor's manner nor in Mrs. Burdell's that was unusual; made an appointment with Mrs. Burdell to take her daughter to Saratoga with me the next day; Mrs. Burdell was to send Georgiana to the depot at 11 o'clock the next day; left her with that understanding; was not certain that Dr. Burdell knew of the appointment.

*Cross-examined.* Have called the prisoner Mrs. Burdell; did not know her as Mrs. Burdell on the day when I was at the house No. 31 Bond st.; I had never, up to that time, known her by any other name but Cunningham.

*William A. Beecher.* Am a brother of last witness; gave my brother a check for money for the tuition of Georgiana Burdell; received that check from Dr. Burdell, upon the Artizan's Bank; the check was for sixty dollars, and dated ahead a few days.

*Dr. John F. Carnochan.* Am Professor of Surgery in the New York Medical College; was present at No. 31 Bond st. on the Monday succeeding the murder; saw the body of Dr. Burdell, but did not examine it manually at all; have read the medical examination, as signed by Drs. Uhl, Woodward and others, and saw two or three of the wounds measured; noticed the wound in the neck, and considered it a very dangerous one—very likely to prove fatal. The vital organs which are located in the region where that wound was given are the large blood vessels of the neck and the nerves of the neck; the large nerves which lead from

the brain to the stomach and lungs, and other nerves.

*The District Attorney.* We should be happy to hear Dr. Carnochan on any point of which he has medical knowledge; but we must require him to confine himself to what he saw. Unless comparisons of medical testimony were accompanied by simultaneous observations, we object to this evidence.

The Court decided that counsel for defense might put a hypothetical case and take the doctor's opinion.

*Counsel* produced the physician's report of the medical examination and read it section by section. *Dr. Carnochan* answered the questions put to him as follows:

1. The wound in the left breast, below the nipple, between the fourth and fifth ribs, he considered dangerous, most probably fatal.

2. Wounds in the heart are almost invariably fatal, but not so immediately fatal as a wound in one other part would be. This part was at the junction of the head with the spinal column. A wound given there kills instantly; but a man may live for a short time after receiving a wound in the heart.

3. A wound directed so as to pierce the right ventricle of the heart would most certainly prove fatal, particularly if the instrument with which it was inflicted were drawn out.

4. The wound in the right shoulder would be likely to prove fatal. One of the large arteries in proximity to the heart passes there, and a blow there would be one of the most dangerous wounds that could be inflicted.

I think that these wounds were inflicted by some person who had a knowledge of the anatomy of the human body; do not consider that these wounds were accidental; have had considerable practice as a surgeon, in looking at wounds inflicted by violence; am surgeon to the largest hospital in the country, I believe, and besides, in private practice, have seen a great deal of surgery; have never known a case where so many wounds were inflicted in vital parts; have been in the room where the murder was committed since my first visit, and in company with Drs. Uhl and Roberts examined the blood and marks. My opinion is that the first blow received by Dr. Burdell was given in the shoulder, while the Doctor was sitting at his desk, near the door, on the right hand side going out, and that it was inflicted by a person standing behind him. The natural inference is that the person struck jumped up, panic-stricken, and made towards the door that the assailing party tried to intercept him and prevent him from getting out; and that while standing face to face, or Dr. Burdell a little to one side, the left side of the neck was wounded. The relative position of the parties when the left side of the neck was struck, would be, that Dr. Burdell's face was towards the door, or perhaps slightly turned, and that the person who struck the blow had his back to the door; think this was a right-handed blow; a person of less strength than the Doctor could not have inflicted those wounds without showing marks of the struggle; supposing that one person were a woman, the prob-

ability of marks being left upon her person would be greater than on the person of a man. Females show bruises much more easily than males, that is, they show signs of a bruise more easily. The tissues are more delicate; a lady's arm, even when moderately pressed, will show marks there next day; there are no indications that these wounds in the neck were inflicted by a left-handed person. The inference is that the person was as tall at least as Dr. Burdell; have made some experiments with reference to this trial, to see the amount of force necessary to inflict certain wounds.

(*Dr. Carnochan* detailed his experiments. They consisted in placing a cadaver naked in a sitting position on the floor, then striking it with a small dagger produced in court, in the neck, while naked, and in this posture—the force required to pierce the body being very small—then throwing a dissecting coat over the body and repeating the process with considerably increased force, when the dagger recoiled from the resistance of the woolen substance. The experiments were conducted under the doctor's supervision by two of his assistants.)

Have made experiments in burning clothing in a house; the effect of the burning of articles of woolen clothing in emitting an odor which would permeate the apartments of a house, would depend upon the quantity of the material burnt; a large amount would produce a very perceptible odor, as in the case of bed clothes, blankets, etc., taking fire; such an amount of burning woolen would produce an odor which

would permeate the contiguous rooms and remain for some time; it might necessitate the cleaning out of rooms, and ventilating them for several days; I was called to see the case of a person burned by the bed clothes getting fire, and my clothes were so saturated with the odor that I had to undress when I went home; the bed clothes were considerably burnt in that case. If the burning clothes were saturated with blood, that would not add to or detract from the odor.

*Cross-examined.* As to what spot there is in the human body, between the hips and the top of the head, where a wound eight inches long and one and a quarter deep, could be inflicted and not be dangerous, whether inflicted before or behind, I would say that some wounds are more dangerous than others. Many persons are wounded in the abdomen and chest and recover. A wound would not be fatal on the right side of the chest; a pistol bullet may pass through the chest and the man live.

*Dr. W. B. Roberts.* Am a dentist, residing at No. 55 Bond st.; had known Dr. Burdell three years; have been acquainted with Mrs. Cunningham since August, 1855, when I was introduced to her by Dr. Burdell at Congress Hall, Saratoga Springs; since that time have had intimate business relations with Dr. Burdell up to the day before his death; was frequently at his house, and was there on the Sunday prior to his death; Dr. Burdell on that occasion showed a daguerreotype which he very recently had taken; Mrs. Cunningham and her daughters were present; Dr. Burdell showed it to them and asked

if it looked like him; I was in the habit of going into Dr. Burdell's office and calling upon the family very frequently; within a year past had often seen Dr. Burdell and Mrs. Cunningham together; they went out together; had met them in the street together frequently, arm in arm; they were at Saratoga Springs together last July; met them on the boat and went to Saratoga with them; they supped together on the boat; when they arrived at Saratoga Dr. Burdell went to Congress Hall and Mrs. Cunningham went to Dr. Beecher's; was with them when they took a ride out to Saratoga lake; Augusta Cunningham went with them; have seen them together at private houses, of which I do not wish to give the names or number; the people would rather their names would not be given.

The COURT. You have no right to disclose the private affairs of persons not interested in this suit.

*Dr. Roberts.* During the past winter, or since Mrs. C. has lived in the house, I would see them perhaps oftener together than during the time they boarded there, because I called about the time that the Doctor went to his dinner, and he would often come into the parlor and stay a few minutes, and say that he was going out, or going to dinner; and most generally spoke to Mrs. C. to inform her that he was going out; sometimes the girls would admit me after office hours, sometimes the little boys, sometimes the young ladies; sometimes, if the young ladies were sitting at the window and saw me coming in, they would open the door; on two occasions I rang the



bell and took hold of the door knob and found it open; that was two or three weeks before the death; it was after the lock had been remodeled; on one occasion I found that it was not bolted at all; always after that, whenever I did go there, I always caught hold of the knob, if it was opened I walked in and waited until some of them came into the parlor; Dr. Burdell sometimes came to the door when I rang the bell, generally in the day time, the Doctor generally went out evenings. I was informed of the Doctor's death by Mr. Snodgrass coming and ringing my bell on Saturday morning; I dressed as quick as possible, and went to 31 Bond st.; as I was coming down stairs met Hannah, the cook; ascended the stairs to the Doctor's door, and there found Dr. Mayne's student at the door with a key upon the outside; he had locked the door, and was standing by the door, and Dr. Mayne was just at the foot of the stairs leading into the third story; think that Mr. Staples was either at the door or just beside me; looked into the Doctor's room and saw the Doctor; saw some spots in the hall, and closed the door; then went up stairs after looking into the room; went up stairs where the ladies were; opened the door; found Mrs. C. sitting in a rocking chair by the side of the bed; Snodgrass was holding her; she was crying, and the first remark I think I heard her say, that if the Doctor was dead, she could not live; that in the spring he had promised to make everything right. She said she knew that he would do it; I tried to quiet her, and I told her that if he was

dead it could not be helped; she made no remark then, "you don't know the secret," or, "there is a secret you don't know." She said nothing about any marriage in that conversation; we then laid her on the bed; and I being so startled at the "secret," immediately went back to the room where the body was then lying; traced the blood immediately leading from the Doctor's head, between the chair and the center-table, to the desk, on the instrument case which set between the two windows; these drops of blood were mostly round drops, as if dropping from above. Outside there were no drops, but like a brush; the outside knob had a little blood on it; then there was another slight brush, which perhaps could not have been perceived when Dr. Uhl got there; it was just as if a person had swept a coat sleeve slightly on the right side of the casement going down stairs, that seemed to be arterial blood. I was in the room when the defendant produced her marriage certificate. Some time after the coroner had come there, and commenced taking evidence, she informed me that there had been some one up there, and she told me that she could not give her name as Mrs. Cunningham; I asked her why; she said that she was married; I asked her if she had a certificate; she said she had; I asked her for it, and she took it out of some of her drawers and showed it to me; I read it, and when she handed it to me she said: "The Doctor gave it to me himself—he brought it up from the bank and handed it to me himself;" I read the date and handed it back to her; that is the last time I saw



it. She said to me, "that is the secret."

*Cross-examined.* Am a single man; have been in and out of Mrs. Cunningham's house a great deal during the last three years. When I went to Saratoga I went in company with Mrs. Cunningham and the Doctor; had previously known of the suits between her and the Doctor; also saw the bond that was given.

*George D. Cunningham.* Am ten years of age; this is my mother in court; live at No. 31 Bond street; have lived there ever since my mother was there; was there on Friday night when Dr. Burdell was found dead the next day; on Friday evening I was in the parlor with my mother and Mr. Eckel; we would have our dinner sometimes at five o'clock, sometimes at six and sometimes at eight; that night we got it at about the usual time; from that time until the time I went to bed I was in the parlor with my mother and Mr. Eckel; then my mother rang the bell for Hannah and called her up and told her what to have; she talked about some hot cakes; then I went to the parlor with my mother; then Mr. Eckel went up stairs, and I went up to my mother's bed room and Geo. Snodgrass and Mr. Eckel; Mr. Eckel and my sister Augusta were sitting down to the fire, and putting some seed in some bottles for the birds next morning; the birds were in that room; they were canaries; then Mr. Eckel went into his bedroom and I returned up to bed with my brother; Hannah, I believe, went up after us; I heard her and we came down stairs and told mother; my mother told us to wait for George Snodgrass; he

was in my mother's room marking some clothes; my sister was going to boarding-school next morning; he stayed in mother's room till George Snodgrass went up stairs with me to bed; we had a light to go to bed by; we used to use sperm candles in the attic. It was only about fifteen minutes from the time I went up first with my brother till I went up again with George Snodgrass to the bedroom. George Snodgrass and brother slept in the same bed with me; heard no noise and smelt nothing that night; was at breakfast next morning; beside myself there were mother, Augusta, William and Mr. Eckel and George Snodgrass.

*Dr. Enrich Parmly.* Reside at No. 1 Bond street; am the son of Dr. Eleazer Parmly and the nephew of Dr. Samuel W. Parmly, who has testified in this case; Dr. Samuel W. Parmly had a conversation with me on the Monday evening after the murder; I called at uncle's house about seven in the evening, and there heard from him the statement as conveyed to counsel in the note I had sent him. He stated that between nine and ten o'clock on the evening of the murder, he went out to take a walk, and noticed a very strong smell as of something burning and he thought the basement carpet must be on fire, but thinking that he did not smell this until after he opened the front door, it must have been on the outside of the house. He said he went and took a walk of about twenty minutes and returned, but said nothing that I recollected about perceiving a different smell in the evening; I did not recollect his (Dr. S. W. Parmly's) saying any-

thing of having seen a flickering light in the attic window of No. 31 Bond st. that night.

*Rev. Dr. Wm. D. Snodgrass.* Am a clergyman; my present residence is Goshen, Orange county; formerly officiated as clergyman of the Presbyterian Church in this city; have known defendant and her family since the year 1844 or 1845; had been in the same house and at the same table on a few occasions with defendant on and after 13th of December last, when I was a few days at her house; arrived at her house on Saturday morning, the 13th December, and left on Monday or Tuesday after; left my wife there, and she returned on Thursday; never noticed whether Mrs. Cunningham was left-handed; thought I had opportunities of noticing if she ever used her left hand in eating or carving, but had not noticed that she did. During part of the time I was there in December, saw Dr. Burdell and defendant together two or three times, but am not very confident about how often. When I saw them together I heard them converse; observed nothing in their demeanor that attracted my attention different from what might be expected, from the relations I supposed them to sustain towards each other. The demeanor of each to the others was not inconsistent with her residing in Dr. Burdell's house as a tenant, and he residing in the same house as a dentist; saw them together on Monday morning between nine or ten o'clock. The occasion was that of a conversation on the part of Dr. Burdell, my wife, Mrs. Cunningham and myself, in relation to some professional business which the

Doctor was to do for my wife. Mrs. Cunningham had nothing to do with the professional business of Dr. Burdell that I was aware of.

*Samuel H. Catlin.* Am a physician, residing in Brooklyn; have known Mrs. Cunningham for five years; was her family physician during the lifetime of her husband, Mr. Cunningham; three years ago she was attacked with inflammatory rheumatism, which affected both shoulders, but more particularly the right shoulder, the right elbow and the right hand; the effect upon the joints of her hand was to enlarge them; those joints were not at present in a natural condition; the right hand was especially affected, and the joints of both hands were stiffened and weakened; she had not the same power to grasp now as before she was afflicted; the strength of the parts affected would naturally be very much diminished.

*Cross-examined.* Ceased to be the regular medical attendant of the Cunningham family about two years ago, when she removed from Brooklyn; do not know that I attended her professionally after she left Brooklyn; have not examined her hands within that time.

*Edwards Pierrepont.* Am a lawyer and knew Dr. Burdell, but had never seen Mrs. Cunningham till in court this morning. The judgment that had been spoken of, in connection with my name, had been canceled, and Mrs. Cunningham had never any interest therein; there was no assignment.

*George Vail Snodgrass.* Am the son of Rev. Dr. Snodgrass; have been intimately acquainted

with Mrs. C. since the last of July; I resided at No. 31 Bond st.; had resided there from the middle of November to the 31st day of January. At that time I and Mr. Eckel were taken into custody and subsequently I was put under bonds to appear as a witness in this case by the prosecution; am a clerk in a store; saw Dr. Burdell when I resided in that house at different times; saw him on the Sunday preceding his death; saw the defendant during the Friday on the night on which this homicide was committed; came home to dinner that day about half-past six or seven; about half-past seven I went out with Miss Helen Cunningham and purchased some things with her. We went up Broadway, and over to Fourth street in the Bowery and from Bond street to the house; were not long at the store; not above three-quarters of an hour; when we returned I think Mrs. C. was in the parlor and the two boys were there; I remained in the house until the next morning; Mr. Eckel came in shortly after we did; the boys went to bed about nine; at eleven the whole party separated for bed; did not hear Eckel at the breakfast table make a remark in reference to Dr. Burdell: "By jingo, I would like to be at his stringing up if I had not to pull the cord too tight to kill him;" he said, I think, that it was a shame for him (Burdell) to abuse me; I said at the table that morning that Georgie, Willie, my brother and myself came down to let him in, and he was in a great state of excitement, swearing and cursing, and he (Burdell) said that he would knock my head in. I told him that I did not know

how the door became locked, but I was certain that it was not locked at the time I opened it. He called me a liar, and said that he would knock me down. Eckel said in reference to that, nothing except that he (Burdell) ought to be ashamed of himself; no threat whatever was made. Mrs. Cunningham said it was just like his abuse to her; that was all that was said as far as I recollect. Mary Donahue came in one morning after an absence of about four days, much marked and bloated, I think; Mrs. Cunningham threatened to discharge her, and she began to cry and beg; she went down on her knees; she made a great time; this was a long while before the murder—some three or four weeks.

*Cross-examined.* Knew of no unfriendly feeling existing between Mrs. Cunningham and Dr. Burdell; never noticed that she was left-handed.

*Mrs. Hester Van Ness.* Am acquainted with Mrs. Burdell and her daughters and have known her, more or less, since her eldest daughter, Augusta Cunningham, was two years old; first saw Dr. Harvey Burdell two years ago in Twenty-fourth street, at Mrs. Cunningham's house; since that occasion had often seen Mrs. Burdell and the Doctor together; was with them to Saratoga; once remained there a week with Mrs. Cunningham; Dr. Burdell called on her every day, sometimes twice a day, and generally spent his evenings with her; he rode out with Mrs. Cunningham and me; had also seen them together at Mrs. Cunningham's house in this city; never observed anything that indicated unpleasant feelings between them; under-

stood they were engaged to be married, and their conduct was in harmony with such an understanding; Dr. Burdell had alluded to the marriage in my presence; he used to talk to Mrs. Burdell about her dress; wished her to throw aside her mourning and dress in colored gowns; he one day expressed his satisfaction that she had cast off "her black rags" and put on a brown dress; was in the house twice on Friday prior to the Doctor's death, the first time at one o'clock p. m., the second time at four o'clock; Rev. Dr. Beecher, of Saratoga, was there on the last occasion; first heard of the doctor's death about nine o'clock on Saturday morning; little George came for me; went to Mrs. Burdell's room; Mrs. Burdell was there with her two daughters, Snodgrass, Dr. Roberts and a lady who was bathing Mrs. Burdell's forehead; Mrs. Burdell was lying on the bed; she appeared insensible, and took no notice of me for some time; afterwards, when I took her hand, she opened her eyes and said, "Oh, isn't this horrible!" could not recollect what happened during that day, so many persons were in and out of the house, and there was so much excitement.

*Cross-examined.* Am a friend of Mrs. Cunningham's family; her dressmaker; call defendant Mrs. Burdell; did not know her by that name prior to the murder; only knew her then as Mrs. Cunningham.

*Dr. Daniel D. Smith.* Am a doctor of medicine and reside at No. 35 Bond street, two doors from Dr. Burdell's. For a long time with my son conducted some experiments to test the power of

electric current; used pieces of leather and shellac for joining tubes and scraps of woolen rags for cleaning instruments, which was my custom to burn up. On the afternoon of Friday, January 30th, gathered a heap of woolen rags and pieces of leather and threw it upon the remains of an anthracite coal fire, opened the window of the room wide, locked the door, went off and took the cars. On my return to the house next morning found that the smell of the smouldering rags and leather pervaded the whole premises; it was a mixed smell of burning leather and woolen, saturated with chemicals.

*Fernando O. Smith.* Am the son of the last witness; the night before the murder of Dr. Burdell was discovered, came home between ten and eleven o'clock, wearing a large gray shawl and a cap; remember the offensive smell in father's room the next morning; father was in the frequent habit of making chemical experiments, and used woolen rags and pieces of leather in making them. These rags were burnt when they accumulated; had burnt them myself often.

*Mrs. Catharine Dennison.* Am a cousin of Dr. Burdell's; had known him over twenty years; first met Mrs. C. in 1856, and had seen her frequently since in company with the Doctor; had seen them together at No. 31 Bond street frequently and at her own house in Brooklyn in the winter of 1856; their relations to each other were of a most friendly character.

*Herbert W. Treadwell.* Walked in company with four other gentlemen in Bond street, the Friday night on which the murder oc-

curred; about twenty minutes after twelve o'clock got into Bond street from Broadway; remained on the corner of Bond street and the Bowery from fifteen to twenty minutes; noticed nothing unusually offensive in the atmosphere; it was a dark and obscure night.

*Helen Cunningham.* Am the second daughter of the defendant; have resided for the last year at No. 31 Bond street; had made arrangements to leave home the Saturday after the murder; was home Friday at the house with my mother; was a short time away, from half past two in the afternoon until four; with that exception I was in the house all day and evening; we dined that day about six o'clock or a little after; went out in the evening about seven o'clock with George Snodgrass; went out to buy a veil; I brought the veil and showed it to mother; after Mr. Eckel came into the room mother brought up some candies and oranges to send to my sister who was at school; recollect about brothers going up to bed and coming back; George and brothers went to bed near eleven o'clock; when I returned from the street after getting my veil mother had on the same dress she wore when I went out. She was dressed in the same way; wore that dress until she went to bed and she had it on since morning; she wore it until the coroner had it taken off; slept that night with mother in the front room on the third story and sister Augusta; we retired about a quarter past eleven; mother did not get up from the time I retired to my knowledge; did not observe any unusual odor in the house; nor

when I got up in the morning; took breakfast with the family; my mother, George, William and George Snodgrass were at breakfast together and then Augusta came down a few moments afterwards. Mr. Eckel went out before breakfast; Hannah, the cook, told us of Dr. Burdell. She said, "Dr. Burdell is dead," or "murdered."

*Mr. Dean.* Was there any singing in the house on Sunday morning? There was. What was it, at what time, and under what circumstances? I had taken up my prayer book and after reading my prayers my eye fell upon a hymn that I knew, and I took up the book and sang the first verse. Wish you would state what you sang? It is the first verse of the twelfth hymn in the Book of Common Prayer.

*Mr. Dean.* "God moves in a mysterious way His wonders to perform, He plants His footsteps on the sea, and rides upon the storm?" Is that the verse you sang? Yes, sir. Did you or your mother sing anything else that morning? Do not recollect that I did; I was the only person that sang; mother did not sing any.

*Smith Ely.* Am engaged in the leather business in Ferry street; am acquainted with John J. Eckel; called at his boarding place, No. 31 Bond street, on the evening of the 30th January between half-past seven and eight o'clock, and left a note for him with Mrs. Cunningham; do not know what has become of that note. Saw Mr. Eckel on Saturday morning shortly after 8 o'clock at my place of business in Stanton street; merely delivered the note to Mrs. C.; had no

conversation with her except such as simply related to the delivery of the note; noticed nothing peculiar in the manner or appearance of Mrs. Cunningham.

*John Smith.* Live at No. 54 Great Jones street; know Mr. Eckel and premises No. 31 Bond street; delivered, in the latter part of October last, at that house for Mr. Eckel, a rosewood bookcase bedstead; saw at that time Dr. Burdell, Mrs. C. and her two daughters, and Mr. Eckel; put up the bookcase in Mr. E.'s room and was assisted by Dr. Burdell; presented the bill receipted to Dr. Burdell, dated the same day I delivered the furniture and received from the Doctor a check on the Market Bank for the amount; Mr. Eckel came in after I had received the check from the Doctor; Dr. B. said to me while he was assisting, "Every knock you give my wall I shall charge you five dollars for"; he (Dr. B.) spoke about the wall being newly painted.

*Margaret Augusta Cunningham.* Reside at No. 31 Bond street; on Friday, 30th January, was out all day from home, until between 4 and 5 in the afternoon; was at home to dinner with the family; after dinner went immediately up stairs, to the third story front room; went to the attic shortly after that, where my mother and brothers were; my brothers were in the house the entire evening; also Mr. Eckel, Mr. Snodgrass, besides one of the servants, Hannah; during the evening Mr. Snodgrass and sister went out, and Mr. Eckel; Mr. E. came in about 9 and went up into the front room, third story;

think all the family were there; mother, sister, my two brothers, Mr. Eckel, and I think Mr. Snodgrass; Mr. Eckel when he came home brought some candies and oranges and was mixing some seeds for the birds; think there were sixteen or seventeen canaries; there might have been more; they belonged to Mr. E. came in about 9 and went up think mother went to sleep, but sister and myself lay awake some time talking; mother did not leave that bed from that time until the next morning. During the night, at any time, or in the afternoon, from the time I returned until morning when I went down to breakfast, did not hear any unusual sound or any unusual odor.

*Henry S. Smith.* Have been since the recess of the court to the rear of the premises No. 31 Bond street; there is a shed covering the piazza immediately under the windows of Dr. Burdell's room; the distance from the shed to the window is about 6 feet, or less; the height of the shed is about 15 feet, and the width of it is, perhaps, not more than 8 feet; there is a fence dividing lot No. 31 from that of No. 33, which runs up to within 4 feet of the top of this shed; there are three windows on the second story near to that shed, and there are other sheds immediately adjoining, of diverse heights, but nothing to prevent access from one to the other; the door of the stable in the rear of the house No. 31 is fastened by three or four nails on the inside; there is an entrance to the stable from Bleeker street; noticed a ladder in rear of the premises.



The *Counsel for the Defense* requested the Prosecution to furnish them with the legal points they relied on.

May 9.

The *District Attorney* referred to the request of the defense last evening that the prosecution should furnish them with the principal points of law on which he would ask a conviction of the prisoner. At that time he was not prepared to give them in regular form. This morning, however, he was, and Mr. Edwards would present them.

*Mr. Edwards.* Many of the most important legal principles in criminal law, which attach to a conclusion of guilt, lay hold of the prisoner, Emma Augusta Cunningham.

1. Crime may be committed where resentment is dissembled, while legal presumptions are powerless against an accused party where revengeful impulse is so ardent and active as to be exhibited in expression.

These partake of the state of mind and heart, and show motive from its source, and the law inquires for motive.<sup>15</sup>

2. A declaration of criminal intention goes very far in law towards a conviction, when it is followed by the fact of a violent death; and it becomes all-controlling when coupled with the fact that such violent death clearly occurs within the very home or house of the accused.

Such declaration shows an ill will which the person uttering it is prepared, on a fitting occasion and with secreted means, to carry into effect.

3. Positive threats come even nearer conviction. Here desire and purpose legally assume their strongest form. (*Harris' Case*, 12 State Trials, 841-846.)

4. Preparation for the commission of crime, whether auxiliary or otherwise, is even more powerful against a prisoner than words, for its amounts to intention expressed by acts. (*Earl Ferris' Case*, 19 State Trials, 904.) A female servant, living with the prisoner, was sent out to walk with the children. In the present case the servants were sent off to bed. In *Harris' Case*, a deliberate attempt to create an *alibi*, evidently in advance of crime, was made.

<sup>15</sup> *People v. Henrietta Robinson*, 1 Par. Crim. Rep. 649; *People v. Lake*, *Id.* 502.



5. Opportunity and facilities include the possession of means and form together positive criminative circumstances. Here it grew out of existing circumstances and relations. The relation of mistress and keeper multiplied almost indefinitely the opportunities and facilities.

6. A loaded revolver or pistol found in the possession of a woman, in a peaceful neighborhood, who has used threats against a man found murdered in her house, under circumstances like the present, raises a presumption against her, although he may have been killed by another weapon not found,<sup>16</sup> especially when it clearly appears that such pistol was once his property, and there was time to dispose of the killing weapon.

7. Circumstances in this case attach against the prisoner, as well where these circumstances preceded as where they followed the crime.

8. Here was proximity of the accused to the scene of the crime at the very time of its committal, made more near by a false key and lewd intercourse. This raises a legal presumption of participation in the criminal act, especially when coupled with threats.

9. Guilty actions are so often attached to a secret manner of committal of crime, that the law is satisfied with a conclusion drawn from evidence of mere circumstances, and from these alone, and without a single requirement of direct testimony, save the production of the dead body. The commission of the act charged may be fairly presumed by the jury. (Russell on Crimes, 726.)

And a conclusion of guilt may depend upon a number of circumstantial links, which alone may be weak, but taken together are strong and able to conclude.<sup>17</sup>

10. Here medical evidence shows that a more mortal wound might have been given than any of those which were inflicted in this case (namely, where the spinal cord commences), the idea of a wounding by a person possessed of

<sup>16</sup> Commonwealth v. Williams, 2d Cush. 582.

<sup>17</sup> McCann v. The State, 13 S. & M. 471.

anatomical knowledge is much weakened. While the facts of random and helter-skelter cuts, and several mortal wounds, are against the idea that the deed was done by one who was schooled in or had studied surgery or anatomy, as such a one would not have done the former nor found the latter necessary.

Jurors are to take *post-mortem* experiments with great caution, and as possessing no weight. Thus, experiments by blows on a dead body lead to no just conclusions, as common sense tells us that there is a total want of resistance, and an entire relaxation of muscles, while the living man is made up of active substance and principles of resistance.

11. When a palpable murder has been committed, legal circumstances may attach and be sufficient to convict without the necessity of finding the weapon which caused it. The law may require a dead body to be produced before a conviction for murder can attach; but, being produced, and the violence apparent, it does not insist on a sight of the weapon. It can deal with the accused without it.

MR. DEAN, FOR THE PRISONER.

*Mr. Dean.* The defense would expect from the jury a verdict declaring the innocence of the prisoner before they left their seats. In presenting their case to the jury, he did not intend any reference to that brutal man who conducted the inquest on the body of Dr. Burdell; but, nevertheless, he would ask the prosecution to state why it was that his client had been charged with such a crime any more than any other of the million who live within the sound of the fire-bell on the City Hall. They were not before the Court to prove who committed the deed. They were not there to show that it was some father determined to wash out his daughter's disgrace in the blood of her injurer, nor to show that it was committed by the hand of an injured husband seeking vengeance upon the violator of his bed. Neither were they there to show that it was done by one who imagined he had pecuniary advantage to gain by the commission of the deed. They were there to prove that the accused did not commit the murder. They had accepted the gauntlet thrown down by the prosecution, and they had

proved her not guilty. And here, lest he might forget it in another connection, he would ask why was the extraordinary omission on the part of the prosecution to show at what time Dr. Burdell entered No. 31 Bond Street the night of the murder, and where he was prior to that time. The prosecution had not attempted to prove that, but, on the contrary, and reversing the long-established rule in such cases, they had required the defense to prove not only innocence, but where the accused was during every moment of that day and fatal night. They had shown that.

The prosecution had attempted to show that the accused was the mistress of Dr. Burdell, and that she had slain him because he refused to make her his wife. That charge had been amply refuted. It had been shown by witnesses on whom the prosecution had not attempted to cast the faintest shadow of suspicion. In attempting to establish the charge, they had brought in a servant, whose character was sufficiently clear before the jury, to swear that she informed the accused that the doctor was about to lease his house, and that the accused said he might not live to accomplish it—testimony which, if true, could not have escaped the memory of that servant when before the Coroner's Jury, but which, singularly enough, she had not remembered until long afterwards, and then only after having been conversed with by many. But what the prosecution had attempted to prove was by no means so extraordinary under the circumstances as what they had not attempted to prove. It had been shown that during the afternoon Mrs. Hubbard had been in the doctor's room—she was a woman known to have been his mistress, a woman, the accused had declared, she would not suffer to live again in the house with her family. That woman was there, and in the doctor's room; and why, he would ask, had she not been called to testify when she left there? The time when the doctor must make his marriage known was drawing near. Had the doctor called this former mistress—this woman—to his room for the purpose of telling her of his marriage, and that she must be cast off? Was that the case? Was she thus made the

jealous woman? and was jealous woman's fiendish hate thus excited in her breast? She had not been called, that the truth might have been known. She was known to have been in his room. It was not known when she left it, although she was at hand, and might have been called. She knew Blaisdell. It had been known that Blaisdell was there during the afternoon, or was to have been there that evening. Should not this man have been called to show whether he had been there while she was present; and, if so, should not both have been called, to show which was there last. And again, it was claimed that the doctor had gone out that evening. Where did he go? How long did he remain? Whom was he with and with whom did he converse during his absence? The doctor was a man well known in the city. Some one must have seen and spoken with him. Why had such person or persons not been called? Nothing of the kind had been done. The prosecution had charged the accused with having committed the murder, and that was all they had done. It was necessary to have shown at what hour Dr. Burdell was murdered. If Dr. Burdell had partaken of his dinner that day, an analysis of the contents of his stomach would have shown it. If he had partaken of his supper, an analysis of the contents of his stomach would have discovered that important fact. But no witness had been called to that point; and there was no evidence that such an analysis had been made; although it was clear that Dr. Knight, another of the sons-in-law of Coroner Connery, had taken out the stomach before Dr. Woodward, who conducted the examination of the body, arrived. So with the wounds. There has been no sufficient dissection of the parts to ascertain their depth and direction. In fact, there had been no evidence produced by the prosecution fixing any facts other than that Dr. Burdell was killed, and that the accused was not guilty of the deed. We call upon the Judge to direct the jury that, in accordance with the law and the facts, the accused must be declared "Not Guilty" without leaving their seats and I tell the jury that this is their duty.

MR. HALL, FOR THE PEOPLE.

*Mr. Hall* said he did not rise to speak to the little audience of this room or the greater audience of the newspaper world without. He would not be led into the discussion of any irrelevant issues, for he should remember that he was a public officer, and comment simply on the facts. He should not attack the newspapers, because that public officer who could not sustain the honest censure of his newspaper friends had no business to live and call himself a man of a civil character. It had been said that this was a very mysterious murder, but where was the mystery in it that discriminated it from any other murder they had read of? The disappearance of Dr. Burdell for a few hours that night was no more mysterious than the disappearances which were happening every day among ourselves, and which were only unnoticed because we were still alive in person to explain our disappearance if called on. In this case the accused had, to distract attention from herself, raised the hue-and-cry against this man and that woman, and called on the law to apprehend another; but the law was not to be so misled. It placed its hand upon her shoulder and said: "What need have we to go further? You have the motive, the means, the ability, the presence, and you shall be held accountable in the judgment of the honest men of the world." As to the question of motive, he insisted that there was not the slightest particle of evidence that Dr. Burdell had any other enemy in the world.

Notice also the ill-will shown to the doctor by all the members of the family. Even the servants were taught to slight him and refuse him obedience. They quarrelled with him and refused to go down stairs to let him in at night when he was bolted out. So insecure did he seem himself in that house that he refused to eat or drink there, refused the food that was sent him, and took his meals at the principal hotels of the city.

As to the marriage between the doctor and the defendant, the evidence was inferential only. The counsel for the de-

fense had conceded that it was not legally proved, and so the Court would charge them. But if there was a marriage, under old law when jealousy was proved against a wife, and her husband died in her house, she was called upon to show that she had no participation in his death. If she were his wife, did that make the motive any less? Might it not make it greater? Yet this man of the world acted towards the defendant as if she was not his wife—had business dealings and litigation with her afterwards—swore before a Commissioner, in November, a month after the alleged marriage, that he did not have a certain note of hers. The question of the marriage, however, might be dismissed altogether from the minds of the jury. He contended that, whether sham wife or real wife, she was guilty of the murder. There was not only jealousy, but avarice. She was about to be turned out of the house—she was needy. Although Dr. Burdell, as she claimed, was her husband, she had to resort to Dr. Thompson to get her own notes cashed. There was a prospect of her being turned into the street—there was her motive for the deed. And her threats, how could they be explained? Threats, commencing months before, culminating only the afternoon of the murder—how were they to be explained on the supposition of her innocence? He argued that Mrs. Cunningham had sole control of the only clock in the house—Eckel's clock, which stood in her bedroom. She was the clock. The cook went to bed when she said it was ten o'clock; Snodgrass and the rest of the family when she said it was eleven. She directed the movements of the time, and, at her bidding, it went one hour ahead of the real time.

*Mr. Hall* then dwelt upon the evidence that the blow on the carotid artery was given by a left-handed person, arguing that there was proof of the fact. As to the theory that he must have been killed by a very tall person, why, a tall strong man would have had complete control over him when, while seated in the chair, he received the first blow, and could have prevented him from ever rising from it. The strength of the right hand was to the neck, and while the head was

back there was a complete purchase of the whole body, and a slight pressure upon Adam's-apple would enervate him immediately. Doctor Carnochan said that, according to his theory, there was not room enough between the corner and the door to inflict a blow of that nature on the carotid. But the location of the room and the position of the doctor proved that a woman even shorter than the prisoner could have inflicted the blow. He would leave it to his friend the Attorney-General to comment on the evidence for the defense. There was no evidence that this woman ever saw the body of Dr. Burdell; she speaks only about herself and about the secret. Her first statement before the Coroner is about the house. "I leased the house from Dr. Burdell." Her co-defendant came right from his counting-house and gave his testimony, but she wanted Counsel, Counsel, Counsel! She had removed the doctor's pistol and lancet, in preparation perhaps of this very deed. Everything showed a concatenation of circumstances proceeding from the first slight circumstance to the last massacre. If mawkish sympathy enters the jury box—if ever mawkish sympathy takes control of the jury box, if men surrender their feelings as men, then there is but one other step to take. Mawkish sympathy has then but to ascend to the judiciary, which, thank God, it has not yet reached! Then strike the scales from the hands of Justice, pull the bandage away from one eye and place it on both, and let the community know that while it is true that juries

"When human life is in debate  
Can ne'er too long deliberate,"

yet, that if they deliberate to such an extent as to give immunity to crime, by acquittal, when circumstances are damning, there will come into the world, and be inaugurated, that millennial triumph of the powers of darkness of which we all have read in Holy Writ.

MR. CLINTON, FOR THE PRISONER.

*Mr. Clinton* said he had hoped that after the innocence of his client had been proven, the District Attorney would have



recalled the gross attack with which he had opened the case, but in this he was disappointed, for in his remarks of today he had again repeated the same unwarranted assertions. Had he confined himself to his duty as prosecuting officer, he (Mr. Clinton) might have waived the right of summing up. Why was it that the District Attorney could not let the opportunity pass without distorting every particle of evidence? There was one part of the case that he (Mr. Clinton) wished more especially to advert to. The District Attorney had stated that an abortion had been performed on the defendant. There was no evidence of that, and he contended that it was a base slander. Did this report come from those who knew her best—from any of her associates? No, it came from the slanderous lips of a woman who was drugged with liquor. Hannah, the cook, was able to swear to it. He said “made,” for the thumb-screws were applied to her by the notorious Coroner. But God had, in His wisdom, supplied an antidote to the poison she sought to instil into the jury box. The face of this drunken cook bore the index of inebriation—it looked, indeed, as if she were seething in bad liquors. Had Hannah really made such a discovery as she claimed, would she not, in all likelihood, have spoken of it to some one in the house, or some person she knew? Yet the District Attorney put no question tending to corroborate her. On her cross-examination, too, she showed a reluctance to answer which no upright witness would have shown. The jury would see from her whole manner that there was no reliability to be placed upon anything she stated, except where it was corroborated. Farewell, then, to this foul slander!

But the public prosecutor had not rested here. He had sought to cast a shameful imputation upon the character of the defendant's eldest daughter. Was it not enough that his client should be made to suffer herself? But must the brand of infamy be sought to be placed upon the head of her innocent offspring? Great as was her affliction before, it was nothing to what she must have suffered when she heard these infamous slanders directed against her daughter. The jury

should recollect that, in every instance where Hannah Conlan and Mary Donohue had testified to declarations made in the presence of other parties, they were flatly contradicted. Where they testified to conversations when no one else was present, they could not, of course, be contradicted; but inasmuch as they were contradicted where others were present, they were unreliable in every instance. He further alluded to the feeling displayed by the witnesses. Before the latter had left the court, she gave utterances to curses against the defendant. Yet with all their disposition to falsify, they were compelled to admit facts enough to carry the antidote with the bane of their testimony. They had to admit that, with the exception of the few altercations they testified to, the relations between Dr. Burdell and the defendant had been uniformly kind.

With regard to the expressions alleged to have been made use of by Eckel on the morning after Snodgrass had let in Dr. Burdell, counsel reviewed the circumstances, and asked if the act of young Snodgrass—this kind act of getting up and letting in the doctor—was to be twisted into evidence of bad feeling? This was a cool assurance on the part of the District Attorney, unparalleled, to ask them to find the defendant guilty because, on a certain night, the hall-door lock would not work.

But the learned public prosecutor further laid great stress on the fact that the house was going to be let to Mrs. Stamburg. Now, why should the defendant desire to keep this house when she and Dr. Burdell were both to travel on the continent of Europe this summer? Suppose, even, that all the testimony of Hannah Conlan and Mary Donohoe were true, what did it amount to? No complaint was made against Dr. Burdell by them, except when he wanted to bring in Hubbard to live in the house. Was not she justified, as a mother and a wife, in objecting to have a woman of vile character live in the house? Why, had she not remonstrated, the District Attorney would have used it as an argument to show that her own character was bad.

But, said the District Attorney, this lady had the means of despatching Dr. Burdell, and, therefore, they were to find her guilty of having killed him. Now, the pistol in her possession was accounted for by the fact that the doctor had requested her to keep it. The paper which the doctor had signed was made a great deal of by the public prosecutor. This, however, was easily accounted for when they recollected that the doctor had been reluctant to perform his engagements, and those papers had passed between them prior to their marriage. As to the suits of breach of promise of marriage and slander, sufficient had been said, and he would not take up time with that subject. If she was not married, the District Attorney argued that it was a circumstance tending to prove her guilty of the murder; while if she was married, he seemed to think it showed an equally strong motive on her part to commit the deed. Seeing that he could not bring forward any evidence to convict the defendant, he thought he would throw a stigma upon her family by saying that they bore an ill feeling towards the deceased.

It was further sought to be inferred that because Dr. Burdell had not on one or two occasions drunk some punch sent up by the defendant, therefore there was a feeling of enmity between them. How absurd was such an argument! As to this and other matters, he was quite willing to leave them to the jury without comment. The public prosecutor had said a great deal in regard to the motive of this woman to kill her husband. Now, what earthly interest could she have had to seek his death? He was her husband, in the receipt of a large income, and in a few months all secrecy was to be dispelled; and they were to have traveled together, and to have lived acknowledged as man and wife. Strange as it might seem, with all the foibles of Dr. Burdell, with all the rough points of his character, the defendant loved him as she loved her very existence. This would seem strange to those unacquainted with them; but such was the fact. Whatever had been said derogatory to his memory, even in her defense, was against her wishes. He would leave the case in the hands of

the jury. He felt assured that she would be vindicated, and every stain placed upon her children by this atrocious prosecution would be removed.

THE ATTORNEY GENERAL'S CLOSING.

*Attorney General Cushing.* On the night of January 31st, a murder, excelling in atrocity almost any murder ever committed, occurred in this city, and created all over the country an excitement almost unparalleled. The person suspected of the commission of the murder was now on trial in this court, whither he had been summoned on the part of the prosecution to find out who was the murderer of Dr. Burdell, and not to convict Mrs. Cunningham. He would rejoice to see her acquitted if she were not guilty, but there is no sympathy due her merely because she was a woman. If vengeance came to her, it was her fault; if her offspring had to drink of the bitter cup, it was her deed, not the deed of the Court—not the deed of the jury. He, as prosecuting officer, found himself upon trial here—the District Attorney was on trial. So much sympathy had been created for her, and it was even said that, if set free by the verdict of the jury, she would be followed home by a shouting mob, wild with exultation at her release. Let there be no such mob. If acquitted, let her indeed go home, and, in the silence and solitude of her chamber, thank God that He had delivered her from that fiery trial!

That Dr. Burdell was dead no one disputed. No one denied that he was intentionally killed. It was the task of the prosecution, on behalf of the People, to show who did it. All the evidence was circumstantial. No one saw the deed committed. The evidence tending to the inculcation of the accused was composed of a chain of circumstances, any one of which, taken separately, would seem to be of small importance. But look at the bridge which spanned the mighty Niagara. Would any one think, examining one of those little links, that a sufficient number of them could be so firmly strung together as to compose a bridge able, in its strength, to sustain the weight of the rushing locomotive? So these little circumstances,

added fact to fact and link to link, presented an accumulation of evidence which it might be impossible to resist. If the chain were broken, they must acquit the prisoner; if it were unbroken, they must convict her. All they had to do in the matter was to arrive at the truth; but he would warn them not to suffer their sympathies to carry them too far. Men act from motives; and had this woman any motive to commit this act? If Dr. Burdell were her husband, she either did or did not love him. Did she love him? All the family sat in her bedroom, occupied her bedroom—Snodgrass, Eckel—but who ever saw Dr. Burdell, her husband, there? A husband who never went into his wife's room when almost anybody else could go there! Then there were threats used. Well, for my part, I do not believe much in threats. When two people quarrel, and one says, "I will knock your brains out," he simply means that he would knock the other down, if he dared to.

But here is an extraordinary case. A woman goes to rent the house of Dr. Burdell; she goes to look at the rooms, and the defendant says, "He may not live to see me out of this house." The reality followed close upon the heels of prophecy. It had been asked, would she have said it had she intended to do it? The devil's bars are always too short at both ends, and to ask a person meditating a crime to act first like an honest person is asking too much. If she did this deed, that remark was the devil within her speaking out. It was the interior woman speaking to herself rather than to the person who heard it. He would call the attention of the jury to some circumstances. The servants were sent to bed; the girls slept downstairs. And why? Because one of them was going away. There was such a thing as proving too much. Unfortunately, the three slept in one bed, and the mother immediately went to sleep; they would have enjoyed their conversation as well in their own room. He was not here to cast aspersion upon the daughters, but he would say that Hannah, the cook, was as much entitled to respect as they. It would not do to say that because she was an Irish cook

she was not to be believed. The girl who earns her livelihood by the sweat of her brow is as much entitled to respect as the one dressed in gaudy colors who lives on Fifth Avenue.

I draw the attention of the jury to the conduct of the defendant when she was first told of the murder. She remained in her room, at one time crying and fainting, at another talking of the property, while Snodgrass and Dr. Mayne went down to examine the body. But if she had been his wife, would she have so acted? Would a loving wife, hearing of her husband's violent death, have been prevented from rushing downstairs and throwing herself by the side of the corpse? She could have gone down, and, if fall she must, she would fall on the dead body of her husband, with a sigh that she had not been there to save him. But that woman never loved Harvey Burdell. He was not her husband. One of the jury has asked if she had power to go downstairs. Yes, God gave her that power, and never took it from her. The counsel for the defense has admitted that she was seduced by Harvey Burdell, and that she was not to blame for that. Is she not to be blamed? She, a woman with two marriageable daughters, not to be blamed when she allows herself to be seduced? There was another singular feature about the evidence: a doctor from Brooklyn has said that the defendant had rheumatism and that her joints were weakened. I say to you that I would like to have her, in a fit of passion, stand before that doctor with a dagger in her hand and see whether he would rely for protection on the rheumatic weakness of her joints. Ah, but—says the defense—it was done by an anatomist. An anatomist! You are to suppose that a surgeon steals into this man's chamber and artistically stabs him to the heart. Artistical nonsense! Was Bill Poole artistically shot when he got the bullet in his heart? And yet there is hardly a physician in the city who could not have shot him in the same place! There is no necessity in a man going to a surgical college to learn to stab a man. As for the hymn sung by one of this woman's daughters the day after the murder, they say it was this:

"God moves in a mysterious way  
His wonders to perform."

That was not the hymn she sang. It was to the same tune;  
but the words must have been:

"Woman moves in a mysterious way  
Her wonders to perform."

The policeman's attention was called to this song, as he thought it a strange circumstance that singing should be carried on in a house where a foul murder had just been committed, and the inmates of which were suspected of the crime, one of them claiming that the murdered man was her husband. He would say to the jury that this was the most momentous case they had ever been engaged in. An acquittal of this woman, if she be guilty, will add but another to the many cases on record that no murderer can be convicted at all. All they have to do is to wait until the passion of men is dissipated, till the storm is passed over, and then, with the aid of an ingenious and talented counsel, and with witnesses who are ready to swear anything, the sympathy is all turned in their favor. The consequences of a conviction are awful. This whole family would be ruined—these young daughters lost forever. They must suffer beyond redemption. And these boys, too. But with that the jury had nothing to do, except so far that it should lead them the more carefully to scan the evidence, and see that their verdict was warranted by the evidence. I charge you to look to it that you do not convict but on evidence which is irresistible to your own minds, and which carries deep conviction to your bosoms. When you entered that box, you took the responsibility of standing between her and justice. God and the community so deal with you as you deal with yourselves, your own conscience, and your God!

#### THE CHARGE OF THE COURT.

JUDGE DAVIES. Gentlemen of the Jury: The prisoner at the bar stands charged with one of the highest crimes known



to the law, that of taking the life of a human being—Harvey Burdell—on the night of the 30th of January last. You have heard, with commendable patience and attention, the evidence in support and refutation of this accusation; and you have listened to the comments and scrutiny of the learned and eloquent counsel engaged in this cause upon the testimony thus adduced. It now remains for the Court to state to you the principles of law applicable to this case, and render you such aid as may be in its power in classifying and arranging the testimony, and indicating the proper weight belonging to its various parts in your consideration of it. It can be hardly necessary for the Court to remind you, gentlemen, of the solemn and important responsibilities resting upon you. The oath which you have taken demands of you that you will true deliverance make between the people of this State and the accused, and its fulfillment solemnly requires of you that you divest your minds of all sympathy for, or prejudice against, the prisoner, or any of the various persons connected with this startling tragedy. You must close your minds to all external influences or considerations—divest them entirely of all bias or knowledge, even so far as you are capable, of the party charged with this crime, except as it appears in the testimony which has been given since you were impaneled in this case. Above all, gentlemen, you must not forget that, although you are sitting upon the life of one who belongs to that sex which instinctively appeals to yours for protection and support and sympathy, and which forms the tenderest ties and associations of life, you are to shut your eyes and steel your hearts to those considerations. Crime knows no sex; and justice, in its administration, is no respecter of person, age, or condition. All stand alike equal in its temple, and those who are called on to minister at its sacred altar but bring ineffable disgrace upon its purity and their holy office if they can be swerved from their duty by improper influences or illegitimate considerations.

The Revised Statutes of this State (2 R. S., 656-7, Secs. 4 and 5) declare the “killing of a human being, without the

authority of law (unless it be manslaughter or excusable or justifiable homicide, as hereinafter defined), to be murder, when perpetrated from a premeditated design to effect the death of the person killed, or of any human being," and in some other cases, which are not material to be stated for our present purpose. That the homicide in this case was either justifiable or excusable cannot be for a moment maintained. If there is evidence in this case that sufficient deliberation was had to form a design to take life, and to put that design into execution by destroying life, then there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months. It is enough that the intention precedes the act, although that follow instantly. The law has no favor to extend either to the rapid or slow execution of the design. Malice aforethought, or premeditated design to kill, may be conceived at the moment the fatal stroke was given as well as at any time before. Malice aforethought, or premeditated design, means intention to kill, and if such means are used as are likely to produce death, the legal presumption is that death was intended. So in the present case, if you are satisfied that such means were used by the person or persons who inflicted these wounds upon the deceased, as were likely to produce death, then such killing is murder, and the party who caused that death is guilty of that crime. Assuming, then, that you will find that the deceased was murdered, the next and the momentous inquiry in this case is, did the prisoner at the bar inflict those wounds which caused the death of the deceased, or aid in the infliction of them? This question must be met in this case with calmness and a firm determination on your part to meet all its responsibilities. Public justice demands that the guilty, if ascertained, should make that expiation to the offended majesty of the laws which their violation demands. The peace and good order of the community, and the security and safety of our domestic firesides, alike demand that this great offense, if the offender can be ascertained, should meet its punish-

ment. But these reflections, while they are powerful incentives to the discharge of our duty, and our whole duty, must not lead us to be the instruments of wrong, or confound the innocent with the guilty. There are two modes of ascertaining and proving a state of facts: First, either by positive evidence; or, secondly, that which is in its nature circumstantial. The distinction between them is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of issue on the trial—that is, in a case like the present, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But in this case no one was present at the time of the commission of the offense. No one saw the act performed which caused the death of the deceased, consequently there can be no direct or positive testimony by whom the offense was committed. It is wholly susceptible of strict legal proof. But experience has shown that in such a case resort may be had to circumstantial evidence—that is, that a body of facts may be proved of so conclusive a character, when taken into connection and as a whole, as to warrant a firm belief of the facts, quite as strong and certain as that upon which prudent and discreet men are accustomed to rely in relation to their most important concerns. It would be fatal to the administration of justice if such proof could not be availed of in judicial proceedings, for if it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly unpunished? Strong circumstantial evidence in cases of crimes of murder, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt—for men may be seduced, and often are, to perjury, by many base motives, to which the secret nature of the offense affords peculiar temptations. But it can scarcely happen that many circumstances, especially if they be such over which they could have no control, forming together the links of a transaction, should all unfortu-

nately occur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous. And in a case of circumstantial evidence, when no witness can testify directly to the fact to be proved, it is arrived at by a series of other facts, which by experience have been found so associated with the fact in question that in the relation of cause and effect they lead to a satisfactory and certain conclusion. As when footprints are discovered after a recent snow, it is certain that some animated being has passed over the snow since it fell, and from the form and number of the footprints it can be determined with equal certainty whether they are those of a man, bird or quadruped. As a familiar illustration, we find an apple on the ground; we know it is certain, there can be no doubt of it, that apple once grew upon a tree—that it did not grow upon the ground. You find it lying in the street or on the grass. The conclusion inevitably is that that apple came from some tree, and that it grew there. This kind of evidence is the result of experience and observed facts and coincidences, establishing a connection between the true and proved facts, and those sought to be proved. The advantages of evidence of this kind are, that as it is generally obtained from several and distinct sources, a chain of circumstances is likely to be prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury have not only to weigh the evidence of facts, but after you have deemed the facts established by the evidence, to draw the just conclusions from them, in doing which, gentlemen, in this case, you must not be led by prejudice or partiality, or from any want of due deliberation or sobriety of judgment, to make hasty and false deductions. This source of error cannot exist in positive and direct evidence. Then you have only to judge of the credibility of the witnesses, and that being established, it follows that the facts testified to are to be taken as true. But, gentlemen, it is quite apparent that after you have established in your own minds the facts proved, great care and caution ought to be used in

drawing the inferences from these facts. These inferences must be fair and natural, not forced or artificial. The common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty, a certain one. It will not do that it is probable only; it must be reasonably and morally certain. Another consideration is that each fact which is necessary to the conclusion must be distinctly and independently proved, by competent evidence; because it may and often does happen, that in making out a case by circumstantial evidence, many facts are given in evidence, not because necessary to the conclusion sought to be produced, but to show that they are consistent with it and not repugnant, and aid in rebutting a contrary presumption; and the rule is, that all the facts proved must be consistent with each other, and with the main facts sought to be proved (as in this case, the participation of the accused in the commission of the crime charged). It follows that if any other fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inferences depend, and however plausible or apparently conclusive the other circumstances may be, the charge must fail. The circumstances all taken together must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged. It is not sufficient that these facts and circumstances create a probability, though a strong one; and if, therefore, assuming all the facts to be true, which the evidence tends to establish, they may yet be accounted for on any hypothesis which does not include the guilt of the accused, then the proof fails to make out the charge. It is essential, therefore, that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. We must first be satisfied, as I have already stated,

that the evidence establishes the *corpus delicti*, as it is termed, or the offense committed as charged; and in a case of homicide like the present, you must be satisfied not only that the death of the deceased was by violence, but must, to a reasonable extent, be satisfied that you can exclude the hypothesis of a death by suicide, or a death by the act of any other person. You must be satisfied of this beyond any reasonable doubt. Finally, if upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but, as already observed, the evidence must establish the truth to a reasonable and moral certainty—a certainty which convinces and directs the understanding, and satisfies the reason and the judgment of those who are bound conscientiously to act upon it. These rules, which are derived mainly from the case of the People v. Webster, laid down by the Supreme Court of Massachusetts, are well laid down by Edmonds, Justice, in the case of Polly Bodine; and, as they are briefly stated by him, I will call your attention to them:

First, the evidence must exclude to a moral certainty every other hypothesis but that of guilt. If you can reconcile the facts that are proved with the belief or supposition that the prisoner is innocent—that somebody else committed the guilty deed—then that hypothesis which the law requires does not exist in your minds. You are, secondly, to bear in mind that circumstances are sometimes fabricated by innocent persons falsely accused. As, for instance, an uncle was arrested for the murder of his niece. He was heard chastising his niece severely, and she was heard to cry out, “You will kill me!” She was afterwards missing, and nobody knew where she was. The uncle was strongly interested in her death, because he would have inherited at her death. He endeavored to save himself by dressing up another child to serve as his niece. That very fact was, as might be expected, taken as very strong evidence of guilt. The man was con-

victed, and afterwards the child returned home, having eloped in consequence of her severe chastisement. There can be little doubt that fabricated evidence operated strongly on the minds of the jury. Fabrication is often resorted to by the really guilty to ward off suspicion from themselves. Another rule is, that the supposition of guilt must follow from all the facts, and be consistent with all of them, as I have before indicated to you. With these rules, gentlemen, and bearing them in mind, we will now proceed to consider the case before us. The theory on the part of the prosecution is that the prisoner committed the offense, because it is manifest that she intended to do so, and this intention was indicated by the threats she used and intentions expressed. If threats are used by a person having the power and opportunity of carrying them into execution, and the result threatened had been produced, then it is a strong circumstance, to fasten the guilt upon a party, to show threats used or intentions expressed. They are considerations of peculiar importance, and often controlling. It becomes important for you, therefore, gentlemen, to consider the proof of the various witnesses in regard to this matter, and carefully to ascertain if any such threats or intentions were avowed by the prisoner. I do not think it necessary, after the very able and full comments of the counsel, to go over it particularly. I have observed, during the trial, that you have been most attentive listeners to the evidence, and I have no doubt that all the prominent parts of it are engraven on your memory. You will remember that the important testimony on this subject was that of Hannah Conlan; Davis, a policeman; Wilson, and other parties of less significance. These witnesses have testified to specific threats, and if they are to be believed, it shows an intention on the part of the accused to inflict some injury on the deceased, either for a real or an imaginary wrong. In this connection, it is well for you to consider the relations between the deceased and the prisoner. On the part of the People it is shown that they first became inmates of the same house on or about the first of May, 1855, and that,



if the statement of Hannah Conlan is to be believed, about the first of December following the prisoner was delivered of the foetus of a child, of which she alleged the deceased was the father. That, on the first of May following, the deceased rented a portion of his house to the prisoner for a year, and they continued inmates of the same house up to the time of his death. It would seem to be quite certain that at times they were not on very friendly terms. If the witnesses are to be believed, they frequently indulged in angry feelings towards each other, and it is for you to say whether those feelings resulted from wounded pride or unrequited affection, or from the omission of the deceased to fulfill his plighted vows to her, or proceeded from other causes. You must bear in mind that there is much testimony going to show that the deceased, on many occasions, held out to his friends and to others that he was paying attention to the prisoner with reference to making her his wife; and that subsequently, as the defense alleges, on the 28th of October, they were married. That does not seem, from my view of the case, to be an important consideration. If, however, you deem it necessary, and you are satisfied from the evidence in the case that they were so married, you have a right to assume that in your deliberations. If you think that these things are adequate to satisfy your minds that either from threats, or revenge, or dissatisfaction, these expressions of ill feeling proceeded from these causes, you will be justified in attributing them to that source. If, however, on the contrary, they proceeded from deadly hatred to the deceased, and emanated from a fixed determination upon her part to do him a personal injury, and to the extent expressed, then they are to be taken as strong evidence of such an intent; and if you are satisfied that the prisoner had the power and was in a condition to commit, and could otherwise have committed the offense charged, they are evidence that such intent was accomplished. This leads to another inquiry: could the defendant commit the offense charged? And this leads to the inquiry as to the transactions in the house on the night

of the 30th of January. It would seem to be indisputable that it was arranged, in the early part of that day, that Miss Ellen Cunningham should go with Dr. Beecher the next day, at 11 a. m., to Saratoga Springs, to school. As soon as this arrangement was made, the family commenced preparations for that event. Taking the testimony of the inmates of the house, except that of Hannah Conlan, it would appear that all the members of the family, the prisoner Eckel, two Misses Cunningham, and Snodgrass, were engaged till eleven o'clock in the preparations, when they severally retired to rest, the prisoner and her two daughters occupying the same bed, in the third-story front room; that they so occupied it until morning, the prisoner sleeping in the middle, between the two daughters; that they arose the next morning, and all took breakfast together as usual, except Mr. Eckel, who was called away by a note from Mr. Ely, as he proved; that after breakfast they all retired to their apartments together in this third-story front room, where they were when Hannah, the cook, announced to them the death of the doctor. You will also bear in mind the statement of the daughters as to the dress of their mother on Friday and Saturday. Now, gentlemen, if this statement is true, if the testimony of these witnesses is to be taken as establishing these facts, and there is nothing going to show that what they told was untrue, there can be no doubt that the prisoner did not participate, herself, in this bloody tragedy. It is for you to say, after a careful and deliberate examination of the testimony, sifting it thoroughly, taking into consideration all the relations of the witnesses to the prisoner, and the circumstances narrated by them, and corroborated or contradicted by other witnesses, to say whether it is such testimony as you can safely rely upon. In this connection it is proper to consider the theory announced on the part of the prosecution. They rely upon the threats by the prisoner towards the deceased, and the bitter feeling, the ill-will which was so frequently manifested by her towards him; that having been married to him and being desirous of getting speedy possession of a

part of his property, was an inducement to the commission of this crime; that these motives induced her to commit this crime, and are adequate motives therefor. I do not think it is necessary to go into all the causes urged upon you by the counsel for the prosecution, as having produced this state of feelings between the prisoner and the deceased. Neither is it necessary to refer to the times at which these threats were expressed. If the testimony of Hannah Conlan is to be believed, they were expressed upon the very day of the death of the deceased, showing a continued expression of ill-feeling towards the deceased, by the prisoner at the bar, for several months at least. They also allege that she did it; and that upon the day the deed was committed she ascertained that a boarder in the house, Mr. Ullmann, was not to be at home until late in the evening; that she procured the preparation of a fire in the attic, to be lighted at any moment, for the purpose of destroying the evidence of her guilt; that it must have been committed by some one in the house, and that she was the only person in the house that day who could have any adequate motive for committing the crime, and, therefore, that she must have done it. That about midnight an offensive smell was perceived in Bond Street, like the burning of clothes or leather, and that such burning took place, they say, is evident from the testimony of Dr. Parmly. In reference to the testimony upon that subject, you have, I doubt not, fresh in your minds Dr. Parmly's going out in the early part of the evening, when he smelled an offensive odor; his returning, going out again, and again returning about eleven o'clock, when he smelled it more strongly than before, which he describes as a different odor, and the last he distinguishes as arising from the burning of leather or woollen clothing—also as to the fire in the front attic room, which he saw from the steps of his house. In this connection you will bear in mind the statement of Dr. Smith and of his son—the fact that Dr. Smith had that very afternoon been burning in his stove pieces of woollen and leather. Whether or not this offensive odor might not have been created from that

source it is for you to say. You will also remember the testimony of Dr. Mayne, that he experienced the same offensive smell; also, the testimony of a young gentleman, Mr. Baldwin, who experienced the same odor at an earlier hour, and also the testimony of a young gentleman who went through Bond Street, stopped at the corner of Bond Street, and who did not experience any offensive smell at all. You will also remember the testimony of Mr. Ullmann, who came into the house about half-past twelve, and experienced no sensation of this kind, and the testimony of the inmates of the house, who all concur in stating they experienced nothing of the kind.

Then, gentlemen, there is a theory laid before you, that it was impossible, from the experiments tried, that these matters could have been burned in that grate in that room, without penetrating through the whole house, and creating an odor that would have existed for some hours—twelve to twenty-four. It is for you to take these circumstances into consideration, give them their due weight, and arrive at such conclusions with reference to this fact as you may be advised. It certainly is an important fact for you to arrive at in the progress of the case, because, if you establish it affirmatively, it shows that there must have been some proceeding upon the part of the inmates of that house to do an extraordinary act, which, under the circumstances, might naturally and reasonably create the inference that they were endeavoring to destroy some evidence of guilt. But if you come to the conclusion that there was no matter of this kind burned there, that there was no fire there upon that night, then, gentlemen, the prosecution is without any theory, as I understand it, in reference to any attempt upon the part of the accused in respect to destroying evidences of guilt. Therefore I say that it is an important point for you to consider, because if you establish it in the affirmative, it tends much to elucidate the theory of the prosecution, and if you establish it in the negative it is a very serious obstacle in the way of establishing their theory.

It is alleged that the conduct of the accused on the Saturday when she heard of the death of Dr. Burdell, and her refusal to give testimony before the Coroner, are evidences of guilt. Now, gentlemen, it is a very ordinary means of ascertaining the fact of guilt or innocence to prove the conduct of the party at, and immediately after, the commission of the offense, and the conduct of the party on the first communication being made to them of the offense committed.

You recollect the testimony of Hannah Conlan, who was the first person who announced the death of Dr. Burdell to the prisoner at the bar; you will bear in mind whether her conduct that morning, in dressing herself, in going downstairs, taking her breakfast with her daughters and the rest of the family (Mr. Eckel was absent), returning to her room in the third story, engaging in her domestic avocations—if the witnesses are to be believed—whether it is consistent with guilt or innocence. You are also to bear in mind whether the conduct she exhibited at the time this communication was made evinced innocence on her part of any instrumentality in the death of the deceased, or consciousness of guilt. This conduct has been so frequently alluded to by the learned counsel upon both sides, that it is not necessary for me to recapitulate it; but simply to call your attention to it. It is an important circumstance always—the conduct of the person charged with the crime when they first hear of the offense committed; and also their conduct when the crime is first charged home upon them. Now, among the ordinary evidences of guilt is also the conduct of the party after the deed is committed. Flight and concealment are considered very strong evidences of guilt always. Then, the hearing before the Coroner's Jury—that also should be taken into the account by you. Whether she manifested willingness to give such evidence in relation to the circumstances as were in her knowledge, or whether she showed hesitation, and attempted concealment. You must look to that. And you will also bear in mind all the circumstances under which she was called down before the Coroner, and, if you think

she exhibited any disposition of concealment—a refusal to disclose what she knew—then, that is to be taken as a circumstance against her. Then, gentlemen, another evidence, and which would have been a very striking one in this case, where a strong, stout, active, healthy man, as this deceased is proven to have been, in the prime and vigor of life, could have been murdered, as the deceased is alleged to have been, by a woman; whether such a rencontre could have taken place—whether such a result could have been produced by the prisoner at the bar, without leaving upon her person some marks or evidences of such a rencontre. You remember the evidence of the physician, of such marks remaining upon a female longer than upon a male, and the reason given for that established fact. As no such marks were proven, except the one alluded to under the shawl—and that, I believe, was not made out at all by any evidence—I refused to permit the prisoner to show that there were no marks upon her body, upon the principle well established by law that the party making the charge must prove it. Innocence is presumed until guilt is proven always; therefore, in the absence of any mark you are to assume that her person exhibited no evidence of this rencontre.

The appearance of the clothes of the accused. Now, upon the theory of the prosecution, they not having proven that any clothes in the house were defiled or stained, it must be perfectly apparent from the testimony of the physicians, and the evidences in the room which we have seen, that the person who did inflict these injuries must necessarily have been to a considerable extent covered with blood. I say the prosecution not having had it in their power to show any evidences of garments in the house thus defiled or stained, unless you shall find the theory sustained that this fire in the attic was prepared for the purpose of burning these clothes, it follows that there being no appearance of any stains or of any blood upon any of the garments of the prisoner, or of any in her house at any time, you are bound to consider that there were none. But if you find that fact, it is very difficult

to reconcile the guilt of the accused with the facts which have been proven in this case, and which are manifest and apparent to all, that the person who inflicted these wounds must have had upon his clothes and person marks of blood, if not marks of violence. Now, gentlemen, another evidence—and a striking if not controlling one of the guilt of the person charged with murder—is, finding upon the accused weapons with which the deed either was perpetrated, or with which it might have been perpetrated, or in any place over which the accused had exclusive control or possession—as, for instance, the case put by one of the counsel, of a person shot by a pistol ball, where a pistol was found in the possession of the accused, with which it was possible that the ball had been shot from it; and when the dissection took place, the ball found in the body of the deceased would not fit the pistol; therefore that presumption which, if the ball had fitted the pistol, would have been regarded in law as conclusive, failed entirely, because the two did not agree. Now, if in this present case, there had been found upon the person of the accused, or in any one of her drawers over which she had exclusive control and possession, a weapon such as was competent to inflict these wounds upon the deceased, the case would have been a very strong one; nay, I may almost say, a conclusive one, unless there were some other controlling facts tending to show that the injury was not inflicted by the person who was in possession of the weapon.

Now, how is it in this case, gentlemen? While there was found in the possession of the prisoner—for I consider the bureau in her possession—there was found in her possession this dirk (holding up the dirk to the view of the jury), which I have had one of the officers of the court measure very carefully—its length is four and a half inches, it is half an inch at the hilt, tapering down to a point. Dr. Uhl says those wounds could not have been inflicted with this instrument. Dr. Knight, Dr. Wood and Dr. Uhl measured the wounds, and the statements that they have given show conclusively that these wounds were not inflicted by that instrument, just as in



the case of the pistol ball. It is a perfect mathematical demonstration. Then the lancet blade is thrown out of the case entirely. Then, gentlemen, the only item of evidence about this matter is the pistol being found in the possession of the accused.

Now, it is not alleged or pretended in this case that the wounds were inflicted by the pistol at all, but it is argued that the possession of a pistol by a female is evidence of some murderous intent. Now, what is the evidence in regard to this pistol? Dr. McGuire states that he was present when Dr. Burdell purchased it, or one very much like it. I judge from the subsequent testimony that we commit no error in assuming that this was the pistol which Burdell originally purchased with Dr. McGuire and used as his own. The testimony of one of the Misses Cunningham is that this pistol was given by Dr. Burdell to Mrs. Cunningham, while she was living in Twenty-fourth Street, before she went to the house in Bond Street. It is not a very controlling circumstance in any event, because it is not pretended or alleged that any of the wounds inflicted upon the deceased were inflicted by a pistol. The most that can be made of this circumstance, supposing that the prisoner had inflicted the wounds, is that it was in evidence that she had intended at some time or other (as it is argued on the part of the prosecution) to carry out the design which she had expressed in reference to injuring Dr. Burdell.

Whether the possession of the pistol under these circumstances affords a reasonable presumption for you to draw, is for you to say. The next inquiry which presents itself is, had the prisoner at the bar the physical strength to inflict those wounds? That is a very important question for you to answer, if you get so far as this stage of the case. It is true, gentlemen, and you must bear it in mind, that a person excited by passion would do four-fold what the same person unexcited could; and to determine this question you must regard the testimony in regard to the strength of resistance which Dr. Burdell would naturally be supposed to make.

And it appears to me that this is a very proper point for me to state to you the testimony in reference to the manner in which those wounds were inflicted, saying nothing now about the person who inflicted them. I think all the physicians agree that the first wound was inflicted on the right shoulder, while Dr. Burdell was sitting in his chair at the desk in the center of the room, about midway between the door and the rear of the room. The person, to have inflicted that wound on him, must necessarily have been either in the room when he came in, or was, perhaps, more probably concealed in the front room, and came out after the Doctor had seated himself in his chair; for you will remember that it is in testimony that the door of the front room was locked, and the other access to those two rooms, which we have seen had a passage between them, was from the door of the doctor's office, of which he had the key, and when he went out it was his custom to lock it. Now it is alleged on the part of the prosecution, as one of their grounds of argument to bring the charge home to the prisoner, that she had the key of the doctor's rooms, and that she could, and probably did, gain access to them; and she must have been in them, to make out their theory, at the time when he returned, to go into his room.

You will remember that the bracket light at this side of the window—this bracket light which was near the instrument case—was found lighted in the morning precisely as it was left at night, with head pretty well on; some witnesses say that it was full on, some that it was not quite full on. You will remark I asked the question whether that light was sufficient to enable a person sitting in this chair at the desk to read. My object was to see how generally it lit the room. The answer was in the affirmative, and the room, not being a very large one, must have been very fully lighted. Doubtless the doctor was seated there examining his bank book, or perhaps reading the newspaper, and the person who inflicted this wound on the right shoulder must have necessarily approached from behind him. Dr. Uhl says (and he was con-

curred in) that the wound must have been inflicted from behind while the doctor was sitting, because the wound was on the right shoulder and drops of blood were found on the right side of the chair, as though blood had dropped there from the wound. Some of the witnesses seem to think that this wound must have been inflicted by a person taller than Dr. Burdell. It is for you to say if it was inflicted while he was sitting down, whether it must have been inflicted by a person taller than Dr. Burdell, or not. It is very apparent, I think, that when that wound was inflicted there was something applied to the neck (as from the medical statements there would seem to have been), something either in the shape of a cord or a handkerchief, or a rope, something which was thrown round, which produced a strangling; whether it was done by the pulling of a handkerchief, or by a cord, it is evident that there was some effort of this kind. Immediately the doctor must have sprung up from the chair, and made for the door, because the side of the door and side of the wall manifestly exhibit it, the blood which came from this wound remaining there. The person must have necessarily got the Doctor quite into the corner of the room, and I think that probably would account for the abrasion on the nose spoken of by Dr. Uhl. His head was pushed up into the corner of the room. I think that this theory is sustained by the evidence in the case, for all the other wounds upon the body were upon the left side, and none on the right side at all—not one of them. It seems, if I have correctly looked at the testimony, that the person who inflicted the wounds had the Doctor in the corner of the room, and that the wounds were thus inflicted which caused his death; that he must have dropped down almost instantaneously in the corner, and was drawn a little out, so as to permit the opening of the door, and there lay when he was found the next morning. That seems to me the result of this testimony, from the attention I have been able to give it. I am satisfied that is the theory of the case, and I think all the testimony harmonizes with that view of it. Now, supposing that to be the theory of the case, had the prisoner at the bar

physical strength to have produced those results? And in reference to settling this question, you are to bear in mind the circumstances which have been already detailed—the depth and the number of the wounds, fifteen in number; the circumstance of resistance on the part of the deceased; the absence of all evidence of any injury to the person of the prisoner, and the amount of force necessary to inflict those wounds. In reference to this point, it will be necessary for you to consider the evidence of the witnesses and your own observation as to the force necessary to inflict such wounds, and in this connection also you are to take into consideration the testimony of Dr. Catlin, in reference to the alleged disability of the prisoner, by reason of the rheumatic affection with which she was afflicted three years since. You have heard all the testimony on this subject. The theory was started that the wound on the right side was inflicted by a left-handed person. Dr. Francis thought it might be so. Others thought it might be or might not. You will judge, from the position of the body and of the wounds, if you arrive at the view which I have expressed to you, as to its position at the time the wounds were inflicted, whether or not a left-handed person could have inflicted them. By the testimony of Dr. Catlin it would appear that the rheumatism affected the prisoner's right arm and shoulder to a much greater degree than the left. The theory of the prosecution is that a left-handed person gave this blow, that the prisoner was left-handed, and that the natural conclusion was that it was inflicted by her. You will remember the testimony which has been given in reference to the use of her left hand, and her reason for using it, and you will make such deductions as you deem proper. If you come to the conclusion that the prisoner had the physical strength to inflict those wounds, then you must bear in mind the testimony which has been given in reference to their being inflicted by a person taller than Dr. Burdell.

Dr. Mayne, the first witness examined, supposed that the blow must have been inflicted by a tall man when they were standing up—that is the blow under the ears—and some of

the other physicians expressed the same idea. If you are satisfied that the blow was inflicted by a person taller than the Doctor, then, of course, it could not have been the defendant, for it is conceded that she is shorter than the Doctor. Then there is another theory in the case—that those wounds were of a peculiarly mortal character; that they were nearly every one of them fatal or mortal blows, and that they must have been inflicted by a person having an anatomical knowledge of the human system. It is only necessary for me to call your attention to the testimony of the physicians on the subject. Drs. Francis, Uhl, Woodward and Carnochan, all, as I understand, concur in the opinion that the blows were peculiarly accurate blows. It is for you to say whether this was accidental or not, or whether they were inflicted by a person who must have possessed anatomical knowledge of the human system, knowing where to strike home every blow that was inflicted. There is no proof on the subject that the prisoner has or has not such anatomical knowledge; and if you are satisfied that those blows were inflicted by a person having anatomical knowledge, to have brought it home to the prisoner it would have been necessary for the prosecution to show that she had such anatomical knowledge. I have not felt it necessary to discuss the various theories in reference to whether persons might have got in from the back part of the house or the front, or to call attention to the various suggestions made in reference to this subject. I will state, gentlemen, that you must look at this case with reference to the prisoner at the bar, whether the hypothesis is sustained so as to exclude the idea that this death could have been caused by any other person. In reference to this rule of evidence, I will quote an old and well known authority: “The case must be such as to exclude to a moral certainty every other hypothesis but that of the guilt of the party accused.” In cases of doubt it is safer to acquit than to condemn. Gentlemen, I have now discharged the duty which the law imposes upon me in this most painful and exciting trial. I think that you will bear me witness that I have exhibited no other motive than to elicit the truth, and

the whole truth, and to aid in placing before you any facts which could avail you in solving this great crime. My duty is now ended, and you have to retire to your room, calmly to deliberate and decide on the fate of this unhappy woman at the bar. Meet your whole duty like men feeling your deep responsibilities and the solemnities of your oaths. To your decision I now commit the fate of this unfortunate woman, and the future of herself and her family. While you deal justly by her, it is your privilege also to deal mercifully; for, as I have before remarked, if you have any reasonable doubt of her guilt, that doubt is to be cast into the scale in her favor, and entitles her to your verdict of acquittal. If, on the contrary, on a review of the whole case, you deem the charge contained in the indictment proven, it is your duty to your country and your God to say so, though it be with anguish of heart and may cause deep shame and sorrow to others. But if, in this final reviewing, you are not satisfied of her guilt, pronounce a verdict of acquittal, and let the accused go free.

#### THE VERDICT.

The *Jury* retired and after an absence of a few minutes returned into court with a verdict of *Not Guilty*.

## THE TRIAL OF CHARLES H. GRASTY, THOMAS K. WORTHINGTON AND JOHN M. CARTER, JR., FOR LIBEL, BALTIMORE, MARYLAND, 1893.

### THE NARRATIVE.

In the last quarter of the Nineteenth Century lotteries were carried on in most parts of the United States and though condemned by the local law, they continued to flourish through the connivance of political police boards and police justices. The experience of the City of Baltimore in the alliance of its officers with the gamblers was not different from that of Chicago, New York, New Orleans and the other great cities of the Republic. "Policy"—a favorite species of lottery—was especially popular. It offered great inducements to the ignorant and for those conducting it, almost its entire receipts were a net profit. It is estimated that on January 1, 1893, more than 2000 people were engaged in the prosecution of the business, while the daily receipts averaged \$5000. Of this amount about 25 per cent was used for expenses, possibly 10 per cent in the payment of prizes while 65 per cent or more went into the pockets of the "backers" of the game. The poor and ignorant people of the city were the game's chief supporters. Any wager from one cent up, was accepted by the "writers," the men who collected and recorded the bets, and the delusive odds of nine dollars for five cents had for many years taken the last nickel out of the pockets of poor men, when it was needed for bread or coal. Murders, suicides, burglaries innumerable were directly traceable to the game, without considering the thousands of empty stomachs and cold hearthstones which were but the daily immolation of its devotees. In many households a servant sent to the store for a pound of sugar would purchase three-quarters of a pound and invest



the extra cent in a policy "slip" on her way home. Petty thefts of this sort led to larger ones and a full-fledged thief was often the result.

A Baltimore newspaper, the News, decided to put forth its best efforts to destroy this public evil, and to this end one day in January, 1893, it sent forth its entire reportorial force to buy "policy" tickets and to write up their experiences in the game. The next morning having many columns of the matter already in type, the News instructed its reporters to interview the Chief of Police and the District Captains as to whether there was any "policy" playing going on in Baltimore. All these officers denied the existence of such a thing in the city. But when the evening edition of the News came out the citizens of Baltimore were enabled to compare the statements of its police officers with the results of the newspaper's investigation, as they were printed side by side. The exposure was a thunderbolt from a clear sky. Police, politicians and gamblers were alike dumbfounded, for there was not a suspicion, on their part that the investigation was being made. The policy rooms closed for a time until it was thought that the storm would blow over. But the gamblers were anxious to start again, and so one day in April a secret meeting of the gamblers and officials was called. But the News got wind of this and the next day made it public; gave the names of the men in attendance and included among them two prominent politicians and office holders.

For this article, Charles H. Grasty, Thomas K. Worthington and John M. Carter, Jr., who were respectively, general manager, managing editor and city editor of the News were indicted for criminal libel by the Grand Jury. On the trial, all the efforts of the editors to obtain the truth of the charges were frustrated by the witnesses refusing to answer any questions on the subject, on the pretext that their answers might show them guilty of a criminal offense, and their refusal to testify was sustained by the presiding Judge. But notwithstanding all this, after a trial lasting four days the jury acquitted the editors.

THE TRIAL.<sup>1</sup>

*In the Criminal Court of the City of Baltimore, May, 1893.*

HON. HENRY D. HARLAN,<sup>2</sup> *Judge.*

*May 26.*

The Grand Jury had returned two indictments against Charles H. Grasty,<sup>3</sup> Thomas K. Worthington<sup>4</sup> and John M. Carter, Jr.,<sup>5</sup> who were respectively General Manager, Manag-

<sup>1</sup> *Bibliography.* \* "The Trials of Three Editors of the Baltimore Times on a Charge of Criminal Libel. Stenographic Report. State of Maryland vs. Charles H. Grasty, Thomas K. Worthington and John M. Carter, Jr. Charge—Criminal Libel. In the Criminal Court of Baltimore, May 26, 27, 28 and 29, 1893. Verdict—Not Guilty. A stenographic report of the famous Criminal Libel Case in which it was sought to punish three editors of the Baltimore News for alleging that ex-sheriff Henry G. Fledderman was a 'backer' of lottery policy. From the Press of C. Stanley Stirling & Co., Baltimore, Md., 1893."

<sup>2</sup> HARLAN, HENRY D. Born Harford County, Md., 1858, A. B. St. John's College, Maryland, 1878; A. M. 1884; LL. D. 1894; LL. B. University of Maryland, 1881; assistant professor and later professor of elementary law and domestic relations 1883-1900; professor of constitutional law since 1900; secretary and treasurer of the law faculty, University of Maryland, since 1883; chief judge Supreme Court of Baltimore, 1888-1914, when he resigned to become general counsel of the Fidelity Trust Co., Baltimore; President trustees Johns Hopkins Hospital since 1903; trustee Johns Hopkins University since 1904, later secretary of the board.

<sup>3</sup> GRASTY, CHARLES H. Born 1863, Fincastle, Va. Son of Rev. John and Ella G. Grasty. Educated University of Missouri. Managing editor Kansas City Times 1884-1889. Editor and proprietor Baltimore Evening News 1892-1908. Editor and part owner St. Paul Dispatch and Pioneer Press 1908-1909. Controlling owner and editor Baltimore Sun 1910 to 1914. Director Associated Press 1900-1910.

<sup>4</sup> WORTHINGTON, THOMAS K. Born 1867. A. B. Haverford College, 1888. Ph. D., Johns Hopkins University, 1890, LL. B. University of Maryland. Practiced law and entered into journalism, 1893. Managing editor Baltimore Evening News, 1897-1899. President Title Guarantee and Trust Co., 1902.

<sup>5</sup> CARTER, JOHN M., JR. (1869-1910.) Son of John M. Carter. Born Baltimore. Reporter of the Baltimore News 12 years and its city editor for a considerable period; for 10 years reported for it the proceedings of the State Legislature, and in 1896 and

ing Editor and City Editor of the Baltimore News. In the first the person libeled was described as one Henry G. Fledderman, ex-sheriff of the City; in the second John J. Mahon, a City Councilman.<sup>6</sup> The defendants having been arraigned

1897 was Washington correspondent of the same paper. His political articles were famous throughout Maryland. Was aide on the staff of Governor Lowndes, with the rank of colonel. President of the Journalists Club 1899; president of the International League of Press Clubs at its annual convention held in Baltimore. Later he settled in New York, withdrew from journalism, and successfully engaged in other pursuits.

<sup>6</sup>The indictment which set out the article in full is as follows:

The Jurors of the State of Maryland for the body of the City of Baltimore, do, on their oath, present, that Charles H. Grasty, Thomas K. Worthington and John M. Carter, the younger, late of said city, on the ninth day of April in the year of our Lord one thousand, eight hundred and ninety-three, at the City of Baltimore aforesaid, contriving and unlawfully, wickedly and maliciously intending to injure, villify and prejudice one Henry G. Fledderman and to deprive him of his good name, fame, credit and reputation and to bring him into great contempt, scandal, infamy and disgrace, unlawfully, wickedly and maliciously did write and publish a false, scandalous, malicious and defamatory libel in the form of a newspaper article containing divers false, scandalous malicious and defamatory matters and things of and concerning the said Henry G. Fledderman according to tenor and effect following—that is to say:

ONCE MORE TO THE BREACH—GREAT CONCLAVE OF POLICY BACKERS AND REPRESENTATIVES—THE POLICE WILL HAVE THEIR HANDS FULL AGAIN, STARTING WITH TOMORROW—THOSE WHO WERE AT THE MEETING—LOCATION OF THE NEW POLICY HEADQUARTERS.

Policy is to bloom out again in full force tomorrow.

This declaration has been made by the backers in this city and whispered around in the sanctum sanctorums of the initiated, bruited around in police stations and spoken of in political clubs and in the public buildings.

The political godfathers of this pernicious and degrading game have said "go in" and the fiat has been issued stamped with the approval of "de Ring."

The boys are to sally forth tomorrow to resume their work of home-blasting, character-wrecking, soul-degrading policy writing. For two months or more the monster has been inactive, cowed by the assault made upon it by The News in the memorable exposures of January 25, which were both unexpected and effective.

Now it is about to raise its ugly head again in its entirety and at-

on the first indictment and pleaded *not guilty*, the trial began to-day.

tempt to defy public opinion once more. No one thought at the time that policy had been struck a mortal blow, for it is like the fabled cat and has a multiplicity of lives.

The News has been vigilant, however, and has maintained a watch upon the beneficiaries of the game. The News has stated all along that the game was a side show of the corrupt political ring. Policy could not exist for a day in this community without the favor of the bosses, and it is about to reopen business with their cognizance.

On Monday last, pursuant to a call, the backers of policy in this city met at Arbeiter Hall on South Frederick street to take steps to revive policy. The old idea of freezing out some of the smaller fry was abandoned simply because that within the past few weeks the frozen out writers have been telling the police about the backers who were writing policy, forcing the blue-coats to make arrests whether they liked it or not.

Invitations were sent out to all the policy backers in the city to attend. Thirteen of the blood-suckers assembled, either in person or through their representatives, in response to the invitations, and, notwithstanding the uncanny superstition about the fatal "13," got down to business in short order.

Those present at the meeting, either as backers or as representatives of backers, were John Moon, representing the policy firm of John Moon; John J., alias "Sonny," Mahon, and James, alias "Jimmy," Mahon; William Herlich, alias "Billy," representing the firm of Herlich & Davis, of which ex-Sheriff H. G. Fledderman is said to be a silent partner; John T., or "Butch" Murphy, the famous Seventeenth ward boss, representing the firm of John T. and Charles Murphy and Theodore Balla; Lemuel, or "Lem," Dorsey, representing himself and John, alias "Slick," Greer; James, or "Jim," Welsh, representing the firm of James Welsh, James Brannan and John Noltz; Henry or "Hen," Wagner, representing the firm of Henry Wagner and Thomas W. Marshall; Frank Donahue, Patrick Bradley, John Delaney, "Rudey" Hewitt, James F. Busey, Thomas E. McCready and Charles North; the latter six represented themselves alone.

This distinguished gathering of policy and political lights decided, after considerable discussion, to open the game on Monday, April 10, and have all the writers given the tip and the word passed around that "biz" was to be resumed, if not at the old stand, at least in the old way and under the old heads.

Each backer paid down \$82 as a preliminary guarantee of good faith and to pay the expenses of securing the drawing from Portsmouth, Va., and incidental expenses.

"Tammany Hall," a building with a significant title, was selected as the lair of the tiger or, in other words, as the general headquar-

*Charles G. Kerr*,<sup>7</sup> State's Attorney; *William F. Campbell*,<sup>8</sup> Deputy State's Attorney; *Bernard Carter*<sup>9</sup> and *Thomas G. Hayes*<sup>10</sup> for the State.

*Edgar H. Gans*,<sup>11</sup> *William L. Marbury*,<sup>12</sup> *John M. Carter*,<sup>13</sup> *Howard Haman*<sup>14</sup> and *Skipwith Wilmer*<sup>15</sup> for the defense.

ters of the combine. This building is located on East Lombard street, near Frederick.

It was determined to change the general system of giving out the drawings hitherto in vogue and adopt a new one. Tomorrow, and in the future, in accordance with this determination, unless the "lynx-eyed" guardians of the peace interfere, the drawings are to be issued from this general center and they will be dispatched by trusted messengers to the headquarters of the different backers in this way.

After arranging all the details, this gathering of worthies adjourned and the word has been given round, as decided upon by them, that tomorrow the game would be resumed in its entirety.

The headquarters of the backers, in many cases, will be at the places they occupied before.

Moon's will be on Frederick street, near Fayette.

Dorsey's, opposite Front-Street Theater, in a cigar store, which The News showed up in its policy exposures.

Welsh's, at the northwest corner of Eastern avenue and Dallas street, over a saloon.

Murphy and Balla's, and also Jim Busey's, will be located at new points in South Baltimore.

Herlich's, on Lombard street, near Frederick, over a shoemaker's shop. Herlich is said to have squared himself in the Northwestern district, where he usually does business.

Marshall & Wagner's, on Charles street, near Pratt.

Frank Donahoe's, at the southeast corner of Front and Baltimore streets.

The balance of the worthies have selected headquarters at present unknown to The News.

On Thursday night a general meeting of the writers of a prominent South Baltimore backer was held and instructions issued as to how the game was to be run.

Desultory playing has been engaged in for the past week or more by pickets who have been sent out.

It is said that, in many cases, the arrests made were "bluff" arrests, made to lull the opponents of policy into the idea that the authorities were determined to root out the evil, but whose real intention was to hide the general start to be made on Monday.

Some idea of how the shoe pinches the feet of the backers and how the profits of the game have dwindled may be seen by this statement. On Friday last the total receipts of the game in this

The following jurors were selected and sworn: Orlando K. Price, Thomas Hoyer, George D. Bromley, Alexander D. Morgan, William B. Allen, Matthew Lynch, John L. Butt, Clar-

city was in round numbers, \$200. Three months ago, when the game was in full blast, the receipts were over \$5000 a day.

A fall of \$4800 a day during two months' work is a remarkable decrease in business, and has been accomplished by *The News*, backed and fortified by an enlightened public opinion.

A prominent politician a few days ago, when asked why policy was permitted to flourish in this city, favoring these men, delivered himself of the following explanation, which deserves to live in local political literature: "We find in policy a means of employing a set of men whom we cannot appoint to public office because public sentiment would resent it, but for whom we have uses, and, therefore, must tolerate," they, the said Charles H. Grasty, Thomas K. Worthington and John M. Carter, the younger, then and there well knowing the said defamatory libel to be false; to the great damage, scandal and disgrace of the said Henry G. Fledderman, to the evil example of all others in the like case offending, and against the peace, government and dignity of the State.

<sup>7</sup> KERR, CHARLES GOLDSBOROUGH. (1832-1898.) Born Talbot County, Md. Graduated Harvard Law School 1852; admitted Baltimore bar 1855; assisted in founding a daily newspaper in 1858, and conducted it until 1861, when he resumed the practice of law, which he continued until failing health compelled him to retire. He was actively interested in politics, in the Democratic party; member City Council for several terms; State's Attorney 1879-1893; nominated for Judge of the Supreme Bench, Maryland, 1894. "As a public administrator he was guided by moderation and humane considerations. In the office of State's Attorney he was considerate of the young and misguided. Gentleness of nature and broad human sympathies quickened a conscience in him which knew how to distinguish between the needless severities of the law and merciful conclusions which would fully satisfy all the ends of justice. He was cultivated in mind, polished in manners, gentle in spirit, and strong in doing what he deemed to be necessary and right." *Baltimore, Its History and People*, (1912.)

<sup>8</sup> CAMPBELL, WILLIAM F. Admitted to Baltimore Bar 1875. Assistant State's Attorney 1879-1895.

<sup>9</sup> CARTER, BERNARD. (1834-1912.) Born Prince George's County, Md. A. B. St. James' College, Md. 1852; A. M. 1855; LL. B. Harvard University 1855. Began practice of law in Baltimore, 1855. Nominated, 1861, for State's Attorney of Baltimore City, and (1864) for Attorney General of Maryland. Member of the first branch City Council 1869-1870. Member of the Maryland Constitutional Convention, 1867. Counsel for the Northern Central Railroad Co., later for the Baltimore and Potomac Railroad Co., and for the Penn-



ence W. Biddle, Solomon Himmel, Joshua Ridgley, John N. Hubner, Lewis L. Strohmer.

*Mr. Kerr* announced that *Bernard Carter*, counsel to the Police Board and ex-City Solicitor, and *Thomas G. Hayes*, State Senator and City Counselor, would assist the State in the prosecution.

*Mr. Gans.* The statute authorizing the Court to appoint counsel to assist the State prosecutor in criminal cases limits the power to

sylvania Railroad Co., affiliated roads, 1868. Professor of the University of Maryland Law School, 1878. City Solicitor of Baltimore 1883-1889. Provost of the University of Maryland, 1895-1912. LL. D., Trinity College, 1894. "He was always a Democrat, and one of the orators of that party. He was a member of the Episcopal Church and the leading ecclesiastical lawyer in the State, having taken part in all of the discussions which agitated the church for many years. He had a large and lucrative practice, the result of fine talents well improved, and of a private character above reproach." *Scharf's History of Baltimore*. "His death deprived the Baltimore Bar of a leader whose eminence had been well established for a quarter of a century. He was counsel for the Northern Central and Pennsylvania Railways, and the Chesapeake and Potomac Telephone Co., and an excellent trial lawyer. Corporation law was his specialty. . . . He was prominent in 1882 in the reform movement of that day, being a strong campaign speaker. . . . Large of body and of imposing presence, he was characterized also by massive intellectual strength, together with learning and courtesy of manner." *Baltimore Sun Almanac*, 1913.

<sup>10</sup> HAYES, THOMAS GORDON. Born Anne Arundel County, Md., 1844. Confederate soldier during civil war. Graduated Virginia Military Institute, 1867. Assistant professor of mathematics there, resigning it to accept a chair at the Kentucky Military Institute, which he held four years. Admitted to bar at Frankfort, 1872. Returned to Baltimore same year and began practice. Member Maryland House of Delegates, 1880. Maryland Senate, 1884, 1886. U. S. District Attorney for Maryland during President Cleveland's first term. Re-elected to State Senate, 1891. City Solicitor, Baltimore, 1895-1896. Mayor of Baltimore, 1899-1903.

<sup>11</sup> GANS, EDGAR H. (1856-1914.) Born Harrisburg, Pa. Son of Judge Daniel Gans of the Orphans' Court, Baltimore, who removed to Baltimore in 1870. Graduated City College, 1875; Law School University of Maryland, 1877. Same year admitted to the bar and began practice. Deputy State's Attorney at Baltimore, 1879-1887. Professor of criminal law, Law School, University of Maryland, 1883-1908. LL. D. Loyola College, 1900. Wrote several books valuable to law students and practitioners, and was deeply interested in legislation for the purification of the ballot; had a large and lucrative practice. At his death the *Baltimore Sun* (21 Sept., 1914) said of him (editorially): "For analytical power, luminous



cases "where the public interest requires it." There is no public interest requiring additional counsel here. We object, also, to the persons selected by the State, for the reason that Messrs. Carter and Hayes are at present the private counsel of Mahon and Fledderman (the real prosecutors here) in civil suits claiming large amounts from the defendants here for the very publication for which they are indicted in this case.

*Mr. Kerr* replied at length:

JUDGE HARLAN. I find upon an examination of the authorities on the question of the right of the Court to allow private counsel

and forcible reasoning, capacity for striking and effective presentation of his facts and arguments, Mr. Gans had no superior at the bar of this city. . . . He devoted himself jealously to the law, and no other interest diverted his mind from his profession. . . . He made his name one to be remembered among the strong men who have given distinction and authority to the Maryland Bar." At a memorial meeting of the bench and bar, Judge Stockbridge said: "He stood at the head of the bar of this State. . . . No man was his superior in presenting a case logically and clearly." And Judge Huysler said: "He could present his arguments with a clearness that was irresistible."

<sup>12</sup> MARBURY, WILLIAM L. Born Prince George's County, Md., 1858. LL. B. University of Maryland, 1882. A. M., Johns Hopkins University, 1902. U. S. District Attorney for Maryland during Cleveland administration. President Baltimore Bar Association, 1909.

<sup>13</sup> CARTER, JOHN M. Born Baltimore, 1843. Left school at 15 years to take position in stock broker's office, afterwards clerk in law office, where he began study of law; private secretary of Gov. Bradford of Maryland, 1862-1866. Secretary of State of Maryland, 1866-1867. Admitted to the bar, 1864, and began practice in Baltimore, where he continues to practice. Presidential elector in 1872. For ten years a manager of the Maryland Institute for the Promotion of the Mechanic Arts, and for 37 years its president. An active Freemason for 50 years.

<sup>14</sup> HAMAN, HOWARD B. Born 1857, Kent County, Md. Graduated City High School, 1875, Law School of the University of Maryland and admitted to bar in 1878; made a specialty of mercantile law and established a very lucrative court and office practice as a corporation lawyer. Was professor of corporation law University of Maryland Law School. Organized the movement for good roads in Maryland, and was a director of the Maryland Branch of the Road League. Author of the oyster law which bears his name. Was the head of the movement for the improvement of oyster culture.

<sup>15</sup> WILMER, SKIPWITH. (1843-1901.) Born Northampton County, Va. Son of the Episcopal bishop of Louisiana. After leaving school served in the Confederate army, and held the rank of lieu-

to assist the State in the prosecution of criminal cases that they are in conflict; the cases in Michigan and Massachusetts denying that power and the case in Maine permitting it. In view of this conflict and of the long continued practice of this court to allow private counsel to assist the State, without making any appointment of Messrs. Carter and Hayes in this case as assistant counsel, I will accept the suggestion that has been made by the State's Attorney to let them assist him in the conduct of the case.

*Mr. Gans.* In the first place, we reserve an exception to the ruling of the Court, and in the second place we would like the decision to be a little more specific as to what is meant by "assist him in the prosecution of the case." For example, your Honor will remember that even in the Maine case, where the assistance was permitted, it was permitted upon the theory that State's Attorney would control the prosecution and would close the argument of fact before the jury, and we would like that limitation to be put upon this counsel under your Honor's decision, that they be permitted to assist the State's Attorney; in other words, that the State's Attorney do not step out and allow these gentlemen to conduct the prosecution to the extent of closing the case on the facts before the jury and that your Honor will limit them in that particular as a part of the decision just rendered.

*Mr. Kerr.* I take it for granted that the only reply on the part of the State proper to be made is that the State's Attorney will do his duty and will control the case so far as he may deem it to his duty to require him to do so.

JUDGE HARLAN. I do not think it is necessary to make any explanation as to what the Court has said and if it should appear to the Court at any time during the progress of the case that the case

tenant. Served on the staffs of Generals Gordon and Johnston and was wounded at Maryland Heights, 1864. Graduated law department University of Louisiana. Was admitted to practice in that State in 1867, and in the same year began practice in Baltimore. Member first branch City Council, 1882-1883; president of the second branch 1898. Assisted in drafting a new charter for Baltimore, and as member of boards Awards and Estimates, had much to do with directing first steps of the municipality under this charter. A member of the Merchants' and Manufacturers' Association from its beginning, and most of the time its counsel. During administration of Governor Brown, brigadier-general and judge advocate on his staff. An active member of the Episcopal church. Frequently a delegate to the annual convention of the diocese of Maryland and of the general convention. "As a citizen, lawyer, man, his ideals and standards were always the highest and purest, and he was unflinchingly and uncompromisingly in his adherence to them. . . . He was a clean-handed, pure-hearted gentleman, without fear and without reproach. . . . His life has helped to raise the life of the community to a higher level." Baltimore Sun, July 15, 1901.

is not being properly conducted by the State's Attorney, or that the counsel who are allowed to appear to assist the State's Attorney are going outside the bounds, it will then be time for the Court to interpose.

MR. CAMPBELL, FOR THE STATE.

*Mr. Campbell.*—If your Honor please and gentlemen of the jury: Necessarily in the trial of every case in which a petit jury is summoned into court and impaneled, there is a very important, grave and responsible duty thrown upon their shoulders. No rule of guidance, no maxim by which the jury can be governed will aid them better than to know this one fact in the trial of the case, and that is that they have been impaneled and sworn to well and truly try the case according to the law and according to the evidence.

At once, gentlemen of the jury, upon the threshold of the duties that you have taken upon yourselves, you see at once that but two inquiries are presented to you; one of them is, as a result of the duty that you take upon yourselves to well and truly try the matter, the traverse between the traversers and the State of Maryland, charging this offense, fairly and impartially. That presupposes at once that the jury in entering upon the discharge of their all-important, grave and responsible duty, are free from bias, free from prejudice, free from any ill-will; in other words, that the jury, as far as this case is concerned, are like cold marble, and will only be warmed into action by reason of the testimony that is produced in the case, and the law that is to govern the production of that testimony, and the application of that testimony to the case. No sentimentality, no outside feeling, no matters injected into the case and within the hearing of the jury have any consideration whatever. It matters not to this jury whether there is an invisible empire of crime in the city of Baltimore; it matters not to this jury, as far as the indictment is concerned, and which I will call your attention to in a few moments, whether or not the politicians have so warped the administration of public justice as to prevent a fair and impartial trial. When these issues are made fairly; when

these issues are made in that manner that are free from covert, they will be met properly and in the manner in which they should be met, summarily.

What I want to call the attention of the jury to is this, that all these outside matters, all this sentimentality—because that is what it is—all these coined phrases and petty expressions that have rung through our city so long, while they may have gone into the brain of the jury, they should find no lodgment there; they should be thrown from the jury and obtain no consideration whatever. We are engaged now in the all-important consideration of a great and important case; one in which the Grand Jury of the State of Maryland has found an indictment against the traversers for having libeled or committed the crime of criminal libel. Now in order to understand this case thoroughly, and in order to understand the position of the State as far as this case is concerned, let me call your attention for a moment to the indictment that we have under consideration; to the inquiry that will be suggested, and the only inquiry that will be suggested to the minds of this jury, as far as the law points it out to be suggested, and then briefly give you the definition of what the law of libel is; what is this offense that you are trying; so that while from the view of the case here that shows from the present indications as likely to take up some considerable time, nevertheless it is such a case that the jury can properly apply their minds to the various stages of the case; they can understand it, appreciate it, and intelligently render a just, fair and impartial verdict in the case; that is all every one wants that is connected with the case, a fair and impartial hearing, a fair and impartial investigation, to bring about a fair and impartial verdict in the case. That is all that can be, that is all that is desired. Anything to the contrary would not be in the interest of public justice, and would be contrary to the rules governing a trial of a case in the Criminal Court.

This indictment charges: "The jurors of the State of Maryland"—and I ask the jury to pay particular attention

to this—"for the body of the City of Baltimore, do, on their oath, present that Charles H. Grasty, Thomas K. Worthington and John M. Carter, Jr., late of the said city, on the 9th of April, in the year 1893, at the City of Baltimore, contriving unlawfully, wickedly and maliciously intending to injure, villify and prejudice one Henry Fledderman, to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, unlawfully, wickedly and maliciously did write and publish a false, scandalous, malicious and defamatory libel in the form of a newspaper article containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said Henry G. Fledderman, according to the tenor and to the effect following, that is to say."

Now, gentlemen of the jury, all that you have to do within the investigation of this case, is this, and I now offer in the hearing of the counsel in the case, in the hearing of his Honor, the Judge, and the counsel in the case, the proffer of the State as far as the allegation of this statement is concerned, and that part of the allegation as contained in this newspaper article, a part of which I will read to you in a moment, is all that the State concedes has any application to the matter under consideration here; in other words, all other matters and things not relevant to the essential averment of the indictment, not appertaining to the essential averment of the indictment, have nothing at all to do with the consideration of this case, and the State exclusively relies, under this indictment, on that part of the publication set out in the said indictment, which states that ex-Sheriff Henry G. Fledderman is said to be a silent partner of the firm of Herlich & Davis, which firm in said publication, and I will read that portion, is declared to be backers of policy. Now, that is the offer; that is the proffer of the State, as far as this indictment is concerned. We read the indictment in this way, gentlemen of the jury, the "said Henry G. Fledderman, according to the tenor and effect following, that is to say," we charge in the indictment that these matters, defamatory

as they were, were spoken of and concerning Henry G. Fledderman. Now this is the part, relating to matters and things concerning the said Henry G. Fledderman, according to the tenor and effect following, that is to say, "invitations were sent out to all the policy backers in the city to attend; thirteen of the bloodsuckers assembled, either in person or through their representatives, in response to the invitation, and notwithstanding the uncanny superstition about the fatal thirteen, got down to business in short order. Those present at the meeting, either as backers or as representatives of backers, were John Moon, representing the policy firm of John Moon; John J., alias "Sonny" Mahon and James alias "Jimmy" Mahon; William Herlich, alias "Billy," representing the firm of Herlich & Davis, of which ex-Sheriff Fledderman is said to be a silent partner." Now, that is the alleged defamatory libel. In other words, that ex-Sheriff Henry G. Fledderman is a backer of policy and a partner of one Herlich, who answered the invitation to attend this meeting.

Now that imputes at once to Henry G. Fledderman the act of participating in a violation and a known violation of law, because the policy law is a law upon the statute book and the violation of the policy law is a misdemeanor, and all who are engaged in the commission of a misdemeanor are violating that act and are responsible. I mention that fact to the jury for the purpose of informing the jury that this article itself imputes to Henry G. Fledderman a crime for which he could be punished, which would subject him to the penalties under the lottery law, for being connected with a concern of that kind and character. Therefore, there is the libel; it is a defamatory libel, and being a defamatory libel, charging a crime upon ex-Sheriff Fledderman, and the mere act of publication of that libel imputes necessarily beyond all doubt as a conclusive presumption of law, an inference of law, and when that article was published in this paper it was done with an evil motive; in other words, if the article, being defamatory, being libelous, is published, as we propose

to prove, it was published by The Evening News and circulated throughout this city broadcast, if that article was published, the very moment that article was published, that publication of itself incorporates into the case the very essence of the offense of libel itself, which is the evil motive, the malicious motive, and the only way possible that that state of facts can be repudiated is by resorting to the defense, the statutory defense, pointed out to them of showing that that statement, as made in that paper, is the truth. Now, the truth hurts no one. If in the defense of this case they are able to show that the statement as contained in that defamatory libel that I have just read to you, is a truthful statement, it makes no difference then, as far as the law is concerned, how evil the motive or how evil the intent were, if they can prove it; because the proof of the truth is the justification of the libel itself; formerly you could not prove the truth of a libel; formerly you could not prove the truth, because the truth did the most injury, according to the conception of the old writers on common law. The worse the libel, the worse the injury that was done; but by reason of the statute that we have here, and by reason of other statutes in the various States upon the same subject, the truth of the libel is allowed to be published in justification. Now, I call your attention to that, gentlemen of the jury, because you are the judges of the law, as well as of the facts in criminal cases, and, therefore, in order for you to judge of the law, it is well for you to have a clear conception of what the law itself is.

Now, I mean to say this: I mean to say when any publication that imputes a crime to another, I mean to say that that is a libel. I go to the Richardson case, where the Court of Appeals says:—I do not desire to take up the time of this honorable Court or the jury in reading any of these books at length upon that subject; if necessary we will do it later, but this is the latest decision on this subject of the Court of Appeals of Maryland: "All authorities agree that any written words are libelous which impute to a man fraud, dishonesty,



immorality, vice, crime, or dishonorable conduct—impute a crime—or dishonorable conduct, or that he is suspected of any such conduct, or which suggests that he is suffering from any infectious disease which has a tendency to injure him in his office, profession, calling or trade, or which holds him to contempt, hatred, scorn or ridicule.” Now, if an article imputes to a man any of these things, that article of itself is a libelous article. And then the Court of Appeals again says that the “evil intent”—which I say we charge fraudulently, maliciously and so on—“an evil intent is a conclusive inference and presumption of law from the publication of the libelous matter without excuse.”

Now that excuse which relieves it from this conclusive inference and presumption of law is the justification, namely, the truth as published by the general issue plea in the case. Therefore, when you have libel, when you have the fact of the libel published, you have then all of the elements in the case.

Now, I want the jury to understand that for this reason it is not necessary to show ill-will; it is not necessary that there should be spite; it is not necessary that there should be ill-will; that there should be especial malevolence to the parties; that has nothing at all to do with the case. Malice is not necessary; where the publication itself is *per se* libelous as I have shown you of itself, that it is libelous; malice is an inference of law, and Mr. Wharton, in the eighth edition, Vol. 21, says:

“To constitute malice in the publication of a libel, it is not necessary that personal ill-will to the person libeled should be shown. It is ever as in a parallel case of homicide, if there be shown mischief, temper or reckless acts analogous to that which throws dangerous missiles into a thoroughfare without caring upon whom they fall. Malice is inferred as a presumption, the effect of their publication of a libel is not ordinarily excused by the publisher’s ignorance that it contained libelous matter, hence the publisher of a newspaper is *prima facie* responsible for all that appears in his newspaper.”

Now, gentlemen of the jury, this article itself shows that it was libelous, and the fact of the publication infers malice. The evil intent is, and as Mr. Wharton says, it is analogous

to the position of a man who goes upon the roof-top or somewhere and promiscuously throws missiles around that they may fall and hit you or any one else that they do not know at all; it would not do for a man to come into a court of justice and say he did not intend to do that act; to say that he did not intend to do that act because he did not know the person he was doing the act toward. The law says "no;" if you establish a principle of that kind or character, then crime would go unpunished, because a man is bound to be regardful for the rights of others; he is bound to be careful; he is bound to exercise as far as possible all the circumspection and care and cautiousness and prudence that he can, so that no injury shall be worked to a citizen or community by reason of any reckless publication of a newspaper, reckless use of a newspaper, or reckless use of missiles thrown from a house, either.

That is the meaning of it, and you see, gentlemen of the jury, that the very idea of it goes to show that this is more than a mere peace case. You may say a murder case is a peace case. Every case that is contrary to law, that is a violation of the peace, is a peace case, but while this case is a peace case, nevertheless it is an important case, it is a case of great importance, that of a man's reputation, a man's right to protection under the law, and when they say that the scales of justice may be held up evenly, and by reason of their sentimental statement to try to make it appear toward their own side that these scales of justice should be held up evenly in a court of justice, we say they can only be held up in this way, by a fair and impartial investigation of the facts and circumstances, according to the law and the statutes in this case. Therefore, you take this case in this way, that the Court of Appeals says "an evil intent is a conclusive inference and presumption of law; there is malice." In other words, it is fraudulent, it is malicious, as charged in that indictment, until they relieve themselves of that inference of law by which they are surrounded in this case according to the principles of law which the jury are bound to recognize. Therefore, un-

til they can relieve themselves of that presumption of evil intent by showing this excuse, which the Court of Appeals says, namely, the justification for this libelous matter, the proof of it, they are guilty of criminal libel.

Now, gentlemen of the jury, look at it again. You take this indictment and you read it again. I first started from the invitation; now I go back and I start in this way, so as to explain the meaning of this invitation: "On Monday last, pursuant to a call, the backers of policy in this city met at Arbeiter Hall on South Frederick Street, to take steps to revive policy. The old idea of freezing out some of the smaller fry was abandoned, simply because that within the past few weeks the freeze-out writers have been telling the police about the backers who were writing policy, forcing the bluecoats to make arrests whether they liked it or not," and then, "invitations were sent out to all the policy backers in the city to attend this meeting, and among them was Herlich & Davis, of which ex-Sheriff Fledderman is said to be a silent partner." Now his name is brought into this indictment in that way; that he is a partner; that of itself imputes an evil intent. It is a malicious declaration that this publication was giving to the community.

The effect of the publication has gone into the community. No man has a right to publish a falsehood of another. When a man publishes a thing of another which says that he imputes a crime to him, he publishes a falsehood of another; that is the meaning of the law; unless he can justify it by saying that it is the truth. As I say, truth is mighty; it will prevail. If they can establish the truth of the statement as contained in this defamatory libel charged in this indictment, then they are entitled to a verdict of acquittal at the hands of this jury, but unless they can establish to the satisfaction of this jury to a moral certainty, to a reasonable doubt, unless they can satisfy the minds of the jury that the statements as contained against the citizens as named in their paper are truthful statements, it is your bounden duty under the law, and I say it without fear of contradiction; I say it

unhesitatingly; I say it after being convinced and after reading the law upon the subject, I say that it is the bounden duty of this jury to convict.

That is all I can say in this case. What I beg of the jury is that they take this case under consideration impartially, fairly and truly, and to wipe out of consideration in this case everything that does not attend the case, and lead up to the case. After you have done that and examined the law and been governed by the law and by the evidence in the case, render such a verdict as the dictates of your conscience say you shall render, and then all ought to be, if they will not be, satisfied with your action.

#### THE WITNESSES FOR THE STATE.

*George W. Hanson.* Am Deputy Clerk of the Superior Court. The book here produced is a record of that court and contains the certificate of incorporation of the Evening News Publishing Company. Two of the incorporators and directors are Thomas K. Worthington and Charles H. Grasty.

*John E. Hussey (sworn.) Mr. Kerr.* You are a reporter in the service of the Daily News? *Mr. Hussey.* I decline to answer any question about my service with The News.

*Mr. Kerr.* I ask you to look at the paper which purports to

be of the date of May 23, 1893 and say whether it is an issue of the Daily News. I decline to answer any questions.

The COURT. It does not appear to the Court that his answering the question would tend to criminate him. The privilege is the privilege of the witness, and not the counsel. The question which was asked the witness, as I understand it, was whether he was a reporter of The News, and that question he declined to answer and I direct the witness to answer that question.

*Mr. Hussey.* I was on May 23d a reporter on the News.

*Mr. Kerr.* Now, will you look at that newspaper and tell the jury whether that is an issue of The Daily News of that date, the 23d of May, 1893?

*Mr. Gans.* Do not answer that question. I understand the question to be as to whether that paper was not published by whom?

*Mr. Kerr.* I asked whether that was an issue of The Baltimore Daily News of May 23, 1893.

*Mr. Gans.* We object to that. We object for the reason that the issue of the paper on the 23d of May has nothing in the world to do with this controversy. It does not legally tend to prove anything connected with the case. They offer it for the avowed purpose of

proving that if that paper is conceded to be a publication by The Baltimore News Company, that it contains a statement that certain persons, for example, Mr. Grasty, held a certain position, and Mr. Worthington held a certain position, and Mr. Carter held a certain position, and the paper is offered for the purpose of proving to this jury that these gentlemen did hold those positions. Now, how does it prove that fact? If it is admitted in accordance with the question, it is simply a declaration by the corporation—the incorporation being proved—of certain facts. How can you bring that declaration to bear against Mr. Grasty individually, against Mr. Worthington individually, or against Mr. Carter individually? The declarations are not admissible in evidence except they are admissions; admissions cannot be made by anyone except the agent of the party against whom the admissions are made, and not even then where the agency extends to the parties making admissions of that kind.

*Mr. Kerr.* In order to avoid that we will waive that question for the present; we have other witnesses—

*Mr. Gans.* We understand, then, that that question is withdrawn.

*Mr. Kerr.* For the present.

*Charles Ryan.* Am employed at chased a copy of the Evening  
Fledderman and Kragers. They News. That day was Thursday.  
are tailors. On April 11th I pur- I bought it at the News office.

*Mr. Gans.* We object for the same reason as before. Suppose he did buy copies of The Evening News, and suppose he did buy them at the office of the corporation—the publisher. All that would prove, so far as the proof now offered in evidence is concerned is, that that corporation published that paper, and published, therefore, this alleged libelous article. It would not tend to show that Mr. Grasty published it. It would not tend to show that Mr. Worthington had anything to do with the publication. It would not tend to show that Mr. Carter had anything to do with the publication—and these gentlemen are the defendants in this case. We therefore insist, if the Court please, that the State must show—not that this corporation published this alleged libel—they cannot show that these gentlemen published it by what the corporation does—by an act of the corporation—by the selling of a paper; they cannot do that, I therefore say, if the Court please, that the necessary link in the evidence has not been offered. They have not offered to show—and if they have proof let them produce it—that Mr. Grasty is connected with the corporation in such a way as to make the act of the corporation his act. They have not offered to show that. That is a necessary step, if the Court please, because, if your Honor examines the nature of this evidence offered now—a man goes into The News office and buys a paper and the paper contains this supposed libel. What is the effect of that? The effect if it simply is that this corporation, a certificate of whose incorporation they have proven, has published that particular paper;

but we are not trying the corporation, and the point I make is, it does not tend to show that Mr. Grasty published it—

*Mr. Hayes.* As a matter of course the proof will go for naught, unless we connect the defendants with the corporation. But as we shall rightly insist in the future that the steps shall be taken in their order, I do not ask to be in the attitude of asking the Court to exercise its discretion in the matter, and I will withdraw the witness for the present.

*Harold M. Carter.* I now represent a hotel in Chicago, but formerly was an employee of the Evening News. Was not an employee on April 9th.

*Mr. Hayes.* Up to the time

you were connected with them do you know who were connected with the management of the paper.

*Mr. Gans.* We object to that.

The COURT. There is a case on this subject I would like to examine before ruling on this. It is cited in Odgers on Slander and Libel, and is to the effect that proof of the fact of ownership before the alleged publication is not proof of ownership at the time of publication.

*Mr. Hayes.* We will withdraw the witness for the present.

*Wells J. Hawkes.* On April 8th or 9th I was in the employment of the Evening News. Mr. Grasty, whom I recognize in the court, was the general manager, and the gentleman sitting beside him was the managing editor, and the other next to him, Mr. Carter, was the city editor.

*Charles Ryan.* (recalled.) Was employed as I said by Fledderman and Kragers. The for-

mer is the son of the prosecutor in this case. I bought The News of April 8th at the office counter on April 11th. It is the paper I have here in my hand.

*Mr. Hayes.* We are going to offer it now. We put that paper in evidence. It contains the alleged libelous article; it is offered subject to the limitation referred to—it is limited to that part where Mr. Fledderman is referred to as the silent partner of the firm of Herlich & Davis.

#### THE WITNESSES FOR THE DEFENSE.

*Mr. Gans.* In opening the case for the defense we claim the right to read the whole paper to the jury. It has been read in a fragmentary way and we propose to read it all.

The COURT.. You are entitled to read the whole article, and I will pass upon objections to evidence as they arise.

*Mr. Gans.* That is all we ask your Honor to do.

*Mr. Marbury.* Gentlemen of the jury, you have heard part of the alleged libel, and only that part upon which the State relies. I want to show you now exactly what they left out. The whole article is as follows: (Article of April 8 read.)

*Mr. Marbury.* As one of the preliminary parts of the defendant's case, we desire to offer in evidence the papers in the case of John J. Mahon v. The Evening News Publishing Company and others, of Baltimore City, in the Superior Court of Baltimore City, being No. 110 on the docket of that court, and also the papers in the case of Henry G. Fledderman v. The Evening News Publishing Company and others in the Superior Court of Baltimore City, being No. 108 on the docket of that court.

*Mr. Hayes.* We object to that.

*Mr. Marbury.* For the purpose of showing, may it please the Court, that Messrs. Carter and Hayes, the gentlemen who have been admitted to assist the State in this case, were employed by Messrs. Mahon and Fledderman, and are acting as their counsel in the private suit against the same parties, among others that are being here indicted, the said suit being based upon the same alleged libel.

*Mr. Hussey* (recalled).

*Mr. Gans.* You have been sworn and you have stated that you are a reporter of The News? Yes, sir. I find in this publication which has been read in evidence this statement: "For two months or more the monster has been inactive, cowed, by the assault made upon him by The

News in the memorable exposures of January 25, which were both unexpected and effective." Will you be kind enough to look at this paper, which purports to be the edition of The News of January 25, 1893, and say as to whether that is the edition referred to in that paper?

*Mr. Hayes.* One moment. We object to that.

*Mr. Gans.* Let us hear the objection.

The COURT. What is the offer?

*Mr. Gans.* We offer the edition of January 25, 1893, in evidence, the same edition which is referred to in this particular article which is alleged to be libel.

*Mr. Hayes.* Now, if the Court please, that libelous article—

*Mr. Marbury* (interposing). I object to Mr. Hayes' participating in the case—I do wish to get the objection in the proper shape—any further in the trial on the ground stated in our argument of yesterday, that he is also the private counsel for the prosecuting witness, and is not appointed by the Court, and not entitled, according to our view of the law, to act for the State in this case; and along with that objection I renew the offer which was made a moment ago of the papers in the cases in the Superior Court, and ask your Honor to admit them as a part of the record.

*Mr. Kerr.* We renew the objection to that evidence and ask the Court to rule upon it. The question was before the Court and argued yesterday.

*Mr. Gans.* I do not think my brother Kerr quite understands the point. We want simply to have the matter decided at this point so that there may be no technicality when the matter comes up before



the Court of Appeals. The Court of Appeals may say you objected to them taking part in the case, but you offered no evidence, and there is nothing on record to show that they represented these gentlemen as private counsel in any other suit involving the same matter. Therefore, as a part of the objection made now to Mr. Hayes taking part in the prosecution, we make this offer, and I would like the stenographer to take it down as an offer. We offer to prove as a part of this objection that Mr. Hayes is engaged by Mr. Fledderman in the trial of the civil case, which involves precisely the same publication which is alleged in this criminal trial to be libelous, and which is now the subject of investigation. That is the offer.

*Mr. Kerr.* We have no objection to that. Your object as stated is simply to procure the technical objection.

*Mr. Gans.* That is all. If my brothers will simply concede that they are counsel in the other case.

The COURT. It is an offer in evidence to the Court. It is not offered in evidence as affecting the issue before the jury.

*Mr. Gans.* Not at all. It is offered in evidence for the purpose of enabling the Court to pass on the question.

The COURT. The evidence will be admitted, but any objection to allowing Mr. Hayes to proceed is overruled.

*Mr. Hayes.* At the close of the second paragraph or the third or fourth paragraph, from the beginning, there is this language: "For two months or more the monster has been inactive, cowed by the assault made upon it by The News in the memorable exposures of January 25, which were both unexpected and effective.

They put Mr. Hussey upon the witness stand and put in his hand the issue of January 25, and asked him if that is the issue.

*Mr. Marbury.* That is correct.

*Mr. Hayes.* We think that there could be nothing possible from any conceivable standpoint that could make such an inquiry as that material to the issue in this case.

*Mr. Gans, Mr. Marbury and Mr. Carter* argued the question at great length.

The COURT. The argument has taken a wide range and gone beyond the question before the Court. The special question now before the Court is as to the admissibility of the article in The News of January 25. Objection is made as to the admissibility of that article. The Court sustains that objection.

*John Moon.* Live at 918 Fayette st.; am not in any particular business at present.

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enough to tell the jury as to whether or not you are in the policy business.

*Mr. Gans.* Will you be kind

*Mr. Campbell* objected to that question.

The COURT. I deem it proper now to say that witnesses are not bound to answer any questions that may tend to connect them with criminal offenses that may submit them to prosecution for crime. If

you desire to answer this question, you are at liberty to do it; if you do not desire, you can decline to answer it.

*Moon.* I decline to answer.

*Mr. Marbury.* We ask the State not to interpose its objection to evidence of this character. We cannot prove our case if the State is going to offer a bar to the admission of the kind of evidence which is used in 99 cases out of a hundred where the exigencies of the situation require it. We are not asking any favors. We are not asking the exercise of any extraordinary power. We are not asking the State's Attorney to do what never has been done before. We are asking the State's Attorney to do what everybody knows has been done for others time and time again. It is not an extraordinary proposition that we submit to him. How can he, if it please the Court, go before this jury and ask them to convict these people of having told a lie and of publishing a falsehood if he will not let the witness who knows it open his lips?

To show the absolute necessity of the exercise of this power on the part of the State's Attorney, I need only cite the fact and to say that so far as I can hear, within the memory of men now living, there has not been a single conviction hardly of a policy backer in this town except where he pleaded guilty. You cannot convict them in any other way, and there being no other way to secure a conviction, if you refuse to resort to the only way that is open, what is the inference, may it please your Honor? Let the gentleman draw it for himself.

May it please your Honor, we stand here in no apologetic attitude. We stand here to prove this case according to law and according to the evidence. We stand here to reach justice and to reach justice by legitimate and proper efforts. We do not ask any evidence to be introduced here which is not legitimate and pertinent evidence. We have got to open the door first, though. We have got to get the key taken off from the dark secret of this business before we can let in the light, and that is the gentleman who holds the key, and we demand in all reason and justice that he should put it in our hands or else he should not ask for a conviction before this jury.

*Mr. Kerr.* My learned brother thinks we are trying a policy case here, and he seems only to consider now what I would do in the way of getting evidence in the event of any future policy cases that may be brought here. That is not the case before us. This is a libel case for a libel against Henry G. Fledderman, as alleged in the indictment. It is a question whether Henry G. Fledderman was a partner of Herlich & Co., and if they propose hereafter by any testimony given by this witness tending to show that Henry G. Fledderman was a partner of Herlich & Co., then I will have no objection to such evidence.

*Mr. Gans.* I understand then that the State's Attorney refuses the request that is made.

*Mr. Hayes.* Certainly.

*Mr. Gans.* I have another suggestion. I do not want to argue it, but simply to make it to the court, founded on the authority I have in my hand. I read from section 1454 of Taylor on Evidence, Vol. 2. I read from the beginning, but will skip some parts that are not germane to what I have to say. Speaking of the right of a witness to claim a privilege of this kind, and when he does claim the privilege, what can be done either by the court or the prosecuting officer.

“Other cases, again, simply justify a doubt as to whether the protection has not been carried very far beyond its legitimate bounds. Thus, in an action for a libel, contained in a voluntary affidavit, which the defendant had sworn extra-judicially before a magistrate, the Court held that the magistrate’s clerk was not bound to answer, whether he wrote the affidavit by the defendant’s orders, and delivered it to the magistrate; and it has been decided in Ireland, that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, might refuse to answer any question relating thereto. It is not here intended to insinuate that these cases are wrong decisions; for numerous authorities might be cited, which clearly establish, that if the fact to which the witness is interrogated form but a single remote link in the chain of testimony, which may implicate him in a crime of misdemeanor, or expose him to a penalty of forfeiture, he is not bound to answer; but it is suggested, that, where the question is material to the issue, it should be left to the discretion of the judge whether or not he will enforce an answer, having due regard to the general interests of justice; provided always, that if answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates, or at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness.”

We, therefore, submit the question as to whether in this case the general interests of justice will not justify this Court in enforcing an answer from this witness under the indemnifying clause of the authority which I have read. That being something involving a delicate discretion, and this court being familiar with the surroundings of this case so far as developed, we are forced into the position here of unfolding this criminal conspiracy. We have the evidence by which it can be done. We have the evidence by which every fact published by The News can undoubtedly be shown to be true, at least so we are informed, and therefore, if the Court please, when we stand in this attitude as to whether these defendants can be convicted on a criminal libel, the foundation of which is that they are telling or writing something which is false and malicious, we come into this court and say it is not false; it is true and we tender the witness to this Court that will prove it to be true, and they claim a privilege. I say then that it becomes a matter as to whether this

Court is not exercising its discretion in enforcing under this authority an answer in the general interest of justice.

The COURT. I have sent for another book in connection with the examination. Taylor on Evidence does not disclose or does not say that it is a rule which has ever been adopted; all he suggests is that it would be well to adopt it at the very next session of the Legislature and he gives several communications to the Legislature and goes on, to state what statutes have been passed looking to that rule of the English practice; but the privilege of a witness in this country stands on higher ground, and it is impossible under the constitution for the Court to require the witness to answer. Our own constitution contains the declaration that no man ought to be compelled to give evidence against himself in a criminal case. It was contended that that only related to a case where the man was himself on trial, and had no relation to a case where he was called as a witness against himself. But the Supreme Court of the United States in a case in 142 U. S., page 562, in the case of Counselman v. Hitchcock, says that it is impossible that the meaning of the constitutional provision can be understood that no person ought to be compelled to be a witness against himself in a criminal prosecution. It would doubtless cover such cases, but it is not limited to that. In our own courts in Maryland I find a reference to the case in 7 Gill & Johnson, in the case of Day vs. the State, a provision is contained which led the Legislature to change that. The old provision in the Bill of Rights was that no man ought to be compelled to give evidence against himself in a court of common law or any other court, but the constitutional provision as it stands today contains no such provision, so that it would be impossible even for the Legislature to take away that privilege from a witness in another case. Gentlemen, are you ready to proceed?

*Mr. Gans.* I suppose Mr. Moan can step down then. You can go, Mr. Moan. We are much obliged to you.

*John T. Murphy.* Am door-keeper of the City Council. Decline to answer whether I am in the policy business. Do not know what business Herlich & Davis are in. Decline to say if I attended a meeting with John Moan and other policy men.

*William Herlich.* Am in the coal and wood business. Decline to answer if I am in the policy business or have held meeting with Moan and others.

*Patrick Bradley.* Am at present in no occupation. Was formerly employed by the Fire De-

partment. Decline to answer if I attended meeting with John Moan and others.

*Mr. Marbury.* Now I have one more question to ask you and that is upon what ground do you decline to answer it? Well, it might interfere with myself; on the ground that all the other gentlemen declined; I have the same privilege as they had.

*Mr. Campbell.* He says he has the same privilege.

*Mr. Marbury.* He said it might interfere with himself.

*Mr. Campbell.* He did not say that.

*Mr. J. M. Carter.* Let him stand up and say it.

*Mr. Marbury.* The stenographer can read what he said.

*The Stenographer (Reading.)* Well, it might interfere with myself; on the ground that the other gentlemen declined; I have the same privilege as they had.

*Mr. Marbury.* Do you mean on the ground that you might criminate yourself? No, sir, I mean that I have the same privilege to decline that the other gentlemen have.

*Mr. Marbury.* What did you mean by saying that you put it upon the ground that it might interfere with yourself? Well, I suppose I have the same rights as the other gentlemen; I have the same privilege in the court.

*Mr. Marbury.* Why was it that you said it might interfere with yourself? In no way at all; I decline to answer the question.

*Mr. Marbury.* Step down; that will do.

*John Dulaney.* Live on Front street; keep a hire and livery stable.

*Mr. Marbury.* Now, will you be kind enough to tell the jury whether or not you, a few months ago, were present at this meeting at which Mr. Moan and several other persons were present in regard to policy playing? I decline to answer that.

*Mr. Marbury.* Well, now, do you mean that it might criminate you if you have to answer it; the answer to the question might involve you in the risk of a criminal prosecution? I decline to answer it.

*Mr. Marbury.* You decline to

answer that question? Yes, sir.

*Mr. Marbury.* That's all; I don't want to trouble you unnecessarily.

*Charles North.* Keep a saloon in North Lay street since 1869; have no other business.

*Mr. Marbury.* Now, Mr. North, please state to the jury whether or not you were present at this meeting at which Mr. Moan and quite a number of others are said to have been present, held in the city of Baltimore a few months ago, where the question of policy playing was considered? I decline to answer. You decline to answer? Yes, sir. Why?

*Mr. Kerr.* We object to that question being put to the witness; the Court has decided that, that is a privilege guaranteed to the witness to decline to answer the question.

*The COURT.* They have a right to ask him; if he declines to answer the question because the answer will tend to criminate him he can decide; the Court of Appeals have said that they have a right to have that declination under oath?

*Mr. Marbury.* Now I ask you again why you decline to answer that question. I just say I decline to answer. You cannot tell why you decline to answer; you cannot? No, sir. In the first place I don't remember of attending a meeting in the first place. What did you mean by saying that you declined to answer then? I didn't want to be mixed up in anything that's going on to interfere with me. Is that the reason why you declined, because you feared that you might give some evidence which

might be used as a ground of criminal prosecution? I decline to answer. Isn't that the reason why you decline to answer; you must answer that question; the Judge has decided it. Isn't that the reason why you decline to answer?

The COURT. Answer that question.

Mr. Marbury. I say again isn't that the reason why you decline to answer?

North. Is what the reason?

Mr. Marbury. The fear that by answering you may subject yourself to the danger of a criminal prosecution for policy-playing?

Mr. Kerr. Tend to criminate him is the language the Judge used.

Mr. Marbury. Or that the answer might tend to criminate you; isn't that the reason why you decline to answer? If that is not the reason; what is the reason? Well, I decline to answer.

Mr. Marbury. Now, you have got to answer that question; the Court says so.

Mr. Hayes. Perhaps the Court better inform the witness; the Court has ruled that you must assign your reason for declining to answer, and if you consider it as tending to criminate you, you must assign that as your reason.

North. Well, it might tend to criminate me.

Mr. Marbury. That is all I want to know; you may step down.

Thomas E. McCready (sworn).

Mr. Gans. It is stated in this paper that you were one of the parties at this meeting at which one John Moan and a variety of

other people were present; were you there? I decline to answer. Do you decline to answer on the ground that the answering might subject you to criminal prosecution? On the ground as to the ruling of the Court.

Mr. Gans. That will do then; step down.

Edward Bussey. Am an ex-office-holder of the Democratic party; am not in any business now; am waiting for an appointment; know Mr. Moan and Mr. Murphy; have never attended a meeting of policy backers this year. As to whether I have been present at any meeting at which policy backers were present I decline to answer.

William H. Hamilton. Am in no business; have been in the habit of going bail for persons charged with violating the policy laws. Have several times done so at the request of Messrs Herlich and Davis. Was paid for doing this; do not know where the money came from; it was sent to me; suppose it came from Herlich and Davis.

Thomas J. Hardesty. Am a saloonkeeper; know Mr. Herlich and Mr. Davis; do not know anything about their being connected with the policy business; was a member of the police force last March; as such came to know where the writers of policy were located; have often seen Herlich and Davis on my beat when I was on the police force; never saw Mr. Fledderman with them; did not know what their occupation was; heard people say they were policy backers.

Mr. Gans. Was the business of policy carried on pretty openly? No, sir; not openly. Was



it under the protection of the police in any way?

*Mr. Kerr.* We object to that as wholly inadmissible.

The COURT. This question was so fully argued yesterday that it seems to me it is hardly necessary to have any further discussion of it. I think the objection ought to be sustained.

*Mr. Marbury.* We note an exception.

*Mr. Gans.* Let me ask another question: I don't know but what it may come under the same ruling. When you had the conversation, as you have stated, with these men who wrote policy, in which they disclosed certain matters to you, which are not in evidence, why did you not arrest them?

*Mr. Kerr.* The State objects to that question.

The COURT. The same ruling applies to that.

*Mr. Gans.* Now just one or two more questions; how did you come to leave the police force; did you resign? Yes, sir.

*Mr. Gans.* Let me ask this question: Was your resignation connected in any way with Mr. Fledderman?

*Mr. B. Carter.* We object to that, may it please the Court.

The COURT. I sustain the objection.

*Mr. Gans.* Now, if the Court please, we offer to prove by this witness that he was compelled to resign from the police force by reason of a threat of Mr. Fledderman of the power of Mr. Fledderman, and that removal was brought about because this man would not protect the policy books of Herlich & Davis.

*Mr. Kerr.* We object, if it please your Honor.

The COURT. The Court sustains the objection.

*Mr. Gans.* Your Honor understands the defense's exceptions are all reserved. Now I would like to ask another question, if the Court please. Let me preface it, though, by a preliminary one. Were you not a sergeant of police at one time?

*Hardesty.* I was, yes, sir.

*Mr. Gans.* Do you know Montgomery's saloon on Liberty street? Yes, sir. Was there not a policy book in that saloon? Yes, sir, there was. And who was the backer of that book?

*Mr. Carter.* We object; what has that got to do with this?

*Mr. Gans.* Let me put my question; I am compelled to put it a little direct, you know, because this is a hostile witness. Now I want to ask you this question: when you were a sergeant of police, was there not a policy book at Montgomery's place, represented by Mr. Hewitt, Roody Hewitt, as backer, and did not a man by the name of Michael start a book right next door to it, the backer of Michael's book being Jerry Diggs, and were you not ordered to stand in front of Jerry Diggs' place—did you not order a police officer to stand in front of Diggs' place to close that up and let the other one go ahead?

*Mr. Carter.* We object to that.

The COURT. Objection is sustained.

*Sigamund Adler* (sworn.) *Mr. Marbury.* Are you sworn in a way to bind your conscience? Yes, sir. Are you a Hebrew,



sir? Yes, sir. Are you not accustomed to swear with your hat on? No, sir. Do you not generally swear on the Five Books of Moses? Sir? Do you not generally swear on the Five Books of Moses? I seldom ever come here, but I swear on the Five Books of Moses.

*Mr. Marbury.* I would like to have you sworn on the Five Books of Moses now, if you please, in the usual way.

(The witness was sworn on the Five Books of Moses and with his head covered.)

*Mr. Adler.* Am a saloonkeeper; have kept a saloon on North street for four years; have known Davis, Herlich and Mr. Fledderman for many years. Mr. F. often came to my saloon to take a drink the same as any other gentleman. So do Herlich and Davis. They have all talked together, and with other people, too. A great many people came to my saloon and restaurant, respectable people, sometimes a Jewish Rabbi and lots of merchants.

*William M. Cook.* Know Adler's saloon on North Eutaw street, and his old saloon; go in there sometimes every day and sometimes not for two or three months. On my way home from business, the Telegram office, of which I am editor, I stop in there occasionally. Know Mr. Herlich. Have a speaking acquaintance with him for a dozen years or so. Have often seen him in the saloon. Know Mr. Davis, he was deputy sheriff under Mr. Fledderman. Have known Mr. F. for 25 years. Mr. Fledderman and I met frequently in the old place and this present

place; think Mr. Fledderman goes down after he gets through with business and takes a glass of beer and would meet friends and talk. Mr. Davis and Mr. Herlich among those; have seen those three gentlemen together—Mr. Davis and Mr. Herlich and Mr. Fledderman; am editor of the Telegram, and have been for the last 12 years.

*Frank Smith.* Am a waiter at Adler's; have often seen Mr. Herlich, Mr. Davis and Mr. Fledderman there. Sometimes all three sat at the same table and had supper.

*Walter Virtue.* Am a clerk but have no regular occupation at present; have known Mr. Fledderman since he was sheriff; have seen him at Adler's. Probably about 9 or 10 o'clock every evening I go in there and take a glass of beer and get a little refreshment. It was a pleasant place to meet in the evening; they have tables there where you can rest a little, and the very best people go there, and it is a very reputable place; do not know that some gamblers and sporting men go there; do not know anything about the business of Herlich & Davis. I take the newspapers, but of my own knowledge I know nothing. Was in the Legislature once. If I want a good glass of beer, and I drink a glass of beer occasionally, I go to Adler's and I must say that I have found it to be the best there is anywhere. It is Bartholomay beer, and I have known gentlemen to go squares and squares to that place for the purpose of getting a glass of that beer.

*Edward F. Baker.* Know Davis, Herlich and Fledderman;

Drop into Adler's two or three times a week; have frequently seen these gentlemen there; often consulted Mr. Fledderman there, as he is general agent of the Brush Electric Company of which I am general superintendent. His work is to get business contracts and city business when he can.

*Julius Wagner.* Keep a restaurant in Lexington street; know Herlich and Fledderman; not Davis. Have not seen them together in my saloon; do not know their business.

*Robert Klinefelter.* Am bartender at Adler's saloon; know Davis; he is employed by the Inspector of Weights and Measures; do not know Herlich's business. He often came to our place so did Mr. Fledderman. Davis was chief clerk in Sheriff Fledderman's office. Before I went in the employ of Mr. Adler, I was in the employ of his uncle on Fayette street. Mr. Fledderman used to come into that restaurant, as he comes into this one now. Mr. Adler, the uncle, does not keep the place on Fayette street, now; the nephew has succeeded him and changed the place around on Eutaw street; the same people that used to go to the uncle, a large number of them, now go to the nephew. Mr. Fledderman is there nearly every evening. Don't know what Mr. D. and Mr. H. talked about when they were in that saloon.

*Thomas H. Beckett* (colored.) Am employed at Adler's saloon; have often seen Mr. Davis and Mr. Herlich and Mr. Fledderman there; am a waiter there; is a restaurant as well as a bar; never play policy myself here;

have played it at Atlantic City.

*Elias Rosenbaum, Jr.* Am a merchant; am a city assessor also; know Mr. Fledderman; know Mr. Davis for 25 years; Mr. Herlich I don't know so well; simply know him as having met him; have no intimacy with him whatever; Davis, when he is at work, was a plasterer; know that Mr. Davis has been at plastering from time to time; I gave him work on Lexington street in the house I now occupy some years ago and he did it very satisfactorily; since then he has been an assistant in the office of weights and measures, if I am not mistaken; think the ability that he exhibited while in the Sheriff's office was partly the cause of his getting that; never knew that Davis was connected with the policy business until The News published it; met him Herlich and Fledderman at Adler's often. I go to Adler's three or four times a week in the evening in company with my wife in the ladies' saloon upstairs, where I meet other ladies and gentlemen, and I would leave my wife and go below and meet a great many gentlemen down stairs; don't know that Mr. Herlich is engaged in the policy business; don't know of any other business in which Mr. Herlich is engaged; do not know, indeed, that he is engaged in any business.

*Ernest Waggerman.* Keep a restaurant on North Howard street; know Davis, Herlich and Fledderman. They have not visited my place for a long time; have been keeping restaurant in this city very nearly 20 years; it will be 20 years this fall, and as long as I have been in Baltimore,

Mr. Fledderman and Mr. Herlich    six times in the whole time; do  
have been to my establishment    not know Mr. Herlich's business.

MR. CAMPBELL, FOR THE STATE.

*May 29.*

*Mr. Campbell.* If your Honor please, and gentlemen of the jury: We are approaching the conclusion of this important trial. In order to aid you to arrive at that point in a quicker and more decisive way, the arguments of counsel are adduced for your consideration. The matter as it stands before this jury is plain. The issue before this jury is clear; the pathway that this jury will walk in this case is clearly marked out. In this case but one thing is to be done. Our eyes are to be directed toward one central figure in the case, that is the performance of our duties according to the law and according to the evidence. No sentimentality can enter into the consideration of a case like this. No outside matters can be considered by a jury. No thoughts or considerations that are calculated to seduce the minds of the jury from the performance of their strict, honorable and legal duty can be considered in this case. The jury are to consider this case, whether the law of libel, defamatory libel, has been violated, and if violated, by whom violated, and if violated, and it is known by whom violated, where is the evidence of justification or excuse for such violation. The law in its integrity must be maintained. When you are sworn to try the case according to the law, you mean this, that you will try it according to the law as it exists in the case. When you are sworn to try the case according to the evidence, you swear to try this case according to the evidence as it exists in the case. The law and the evidence are your guardians and your guides in the performance of your duty.

I call your attention to this at the outset of the case, gentlemen of the jury, for the purpose of bringing you back to the case, for the purpose of enlisting your minds and attention to the principal fact under consideration; so that when you will have performed your duty, you will have performed

it, no matter what conclusion you may arrive at, with the conscious knowledge of the fact that you have confined your consideration to the points in issue in the case.

To libel a man is a violation of the law. If a man speaks ill of another, it is a violation of the law; perhaps a violation of the law that is attended to in court in suits for slander or defamation of character; but when a man writes and prints that of another—when a man writes and prints and circulates that of another—when a man writes, prints, circulates and diffuses throughout a broad community that of another, that which is untruthful, that man or these men, whomsoever they may be, violate a cardinal principle of the criminal law.

Every man is entitled to the protection of the law. Every man is entitled to the protection of his property, of his life, of his liberty, of his good name, and no man has a right or no men have a right to speak that of another which is untruthful, unless they take the responsibility of that speaking upon their shoulders. You do not want any principle of law to enlighten you upon a subject like that. That is a principle, not only of law, but a principle of common sense and common justice, required in the interests of common decency itself. I care not what a man says of you, if what he says is true. If what he says of you is a truthful statement and he can prove that it is a truthful statement, then he who says it is not responsible for the saying, because if he proves it to be true, you are responsible for this, because you ought not to place yourself in a position where the truth can be proved against you; but when one speaks of another that which is untrue, that which is false, that which is without the shade or shadow of a foundation, in thought or reason, in theory or in practice, he who speaks this of you speaks maliciously; he speaks falsely; he speaks with an evil intent; he violates the law, and he ought to take upon himself the responsibility of that saying; not only honorably ought he to take upon himself the responsibility of the imposition, but the responsibility is justly placed upon him by the law, if he is unable

to make it appear beyond a reasonable doubt to the satisfaction of an impartial jury, that which he has spoken of another is true. That is the case that the jury have to consider here.

Now, is libel an offense against the law? It is, gentlemen of the jury, and it is divided into various kinds. We have blasphemous libel; we have seditious libel; we have obscene libel; we have defamatory libel, and then we have the system or the division of the offense of libel. Libel is a misdemeanor. In the classification of crimes in criminal procedure, we have them divided into treason, which is the highest, because it stabs at the heart of a government; we have felony, and we have misdemeanor; all of them known to be classes of crime. In treason and in misdemeanor, all who are concerned in their commission are principals in the act, each responsible for the act of the other. In felony, all are not principals; in felony we have the division of principal in the first and principal in the second degree; accessory before the fact and after the fact; therefore the division of the participation in crime of persons as connected with the offense of felony, we have nothing to do with, but as connected with a misdemeanor we have everything to do with, and the term misdemeanor, the definition of misdemeanor, embraces within its scope all kinds of offenses that are not treason and are not felony. Therefore, a man assaults you without intent to kill; that itself is a misdemeanor. If a man commits any crime of any kind or character which does not require a felonious intent in itself, the commission of that offense itself is a misdemeanor, and when I use the term misdemeanor, according to the system of the law, I do not want the jury to understand, in using misdemeanor, that I am calling their attention to an offense that is trivial in the eye of the law. It is a grave offense. A misdemeanor, in the eye of the law, is a grave offense.

It is not a mere petty disturbance of the peace, such as the idea of disturbance of the public peace would call the attention of the minds of the jury to at the first blush, without consideration, namely, when a person threatens another's life

and he goes before a justice of the peace and binds him over to keep the peace; that is a peace case. But every offense is a peace case. Every offense that violates the law is a peace case. The Constitution of the State of Maryland says that the indictment shall conclude against the peace, against the government and against the dignity of the State, and I mean to say this, that a man who publishes a defamatory libel—a man who publishes that of another which is false and scandalous—does that which is contrary to the peace, government and dignity of the State of Maryland. That is what I mean to say, and that is the idea I am intending to impress upon this jury as to the guarantee of the evidence that they are considering here.

Therefore, while this case is not a case of blasphemous libel, while it is not a case of seditious libel, while it is not a case of obscene libel, it is beyond all question, as we will endeavor to show from the testimony in this case, it is beyond all cavil and dispute, a case of defamatory libel which should hold the prisoners, the traversers at the bar, to the strict accountability of the law for their reckless and negligent manner of dealing with the reputation and the character of a man against whom they say that they will prove the truth of the charge, and against whom they have, as I will endeavor to show you here, failed to furnish the slightest scintilla of testimony in the case, to show that they are warranted in circulating broadcast this defamatory, scandalous and malicious article against the man. He will stand upon the case as it is here. We will meet the counsel upon any point that they desire to be met in this case. We will stand upon the charge as it is in this indictment. We will stand upon every scintilla of testimony that is produced in this case, and I will endeavor, before I have gotten through, to show you that not only have they failed to connect Mr. Fledderman with anything connected with policy in the City of Baltimore, but all their testimony in the case, all their manner and mode of manipulating their case before the jury, have demonstrated not only to the jury, but to this community, that Mr. Fledderman is entirely inno-

cent, as innocent as any of the jurymen in this box of the grave and slanderous charges that they make in this progressive journal that they speak so much of in the City of Baltimore.

I do not speak against progressive journalism. I do not speak against the liberty of the press. Everything must work in its own circuit and orbit, just like the planetary system which works within its own orbit and produces a harmony and beauty that testify to the glory and magnitude of the Creator himself. But I say that while I respect progressive journalism, the liberty of the press, yet at the same time I say that at the moment that they outstep the bounds of that liberty that is insured to them, that protection that is given them, that thereby they themselves forfeit these as members of journalism or progressive journalism, as you may call it, and go outside of the matter and are separated from an honorable calling, such as they have in publishing their scandalous and defamatory libel in this community, then they are beyond the limit of progressive journalism, and become amenable to the law. That is what I mean to say.

Now, gentlemen of the jury, I say this is a defamatory libel. Now, what is it? Because that is what we want to know. I will show you, and I refer them, if there is any difficulty on the subject, to all the text-books upon the subject that they wish to see, that in misdemeanors all are principals, but there is no necessity to show that to them; they know it, but it is to the jury that I am speaking.

Therefore, all these persons engaged in the publication of this journal are principals. We have proved that they published it. We have proved that it was the issue of their paper. We proved where it was published. All that matter has been proved.

Now, what is a defamatory libel? A defamatory libel is a matter published without legal justification or excuse, the effect of which is to insult the person of whom it is published, or which is calculated to injure the reputation of any person by exposing him to hatred, contempt or ridicule. Such mat-



ters may be expressed either in words, legibly marked, or in substance or by signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony. I do not want to read much law to the jury, but I want to read that to the jury which is good law. In the case of *Richardson v. State*, the Appellate Court of the State of Maryland, the highest tribunal of the State of Maryland as a State Court, has used this language as to what a defamatory libel is.

We will take that for our guidance in this case, and we will try to see how far the situation as to what the offense is, as laid down by the Court of Appeals in the case of *Richardson v. State*, as fitting this case. Lord Hale says that "an indictment is nothing more than a plain brief narrative of an offense committed by any person, and the necessary circumstances that concur to ascertain its fact and nature." The offense here charged is libel, and the question is, are the necessary circumstances as mentioned in this statement by Lord Hale found in this indictment, so that it is sufficient to warrant a judgment thereon? Now, let us see whether or not this indictment charges matters of an essential description corresponding with this definition which I am now going to give you of what libel is, and we will have disposed of one part of the case.

All authorities agree that any written words are libelous which impute to a man fraud, dishonesty, immorality, vice, crime or dishonorable conduct.

Now, if this article imputes anything on earth to Mr. Flederman it is that he is a member of the firm of Herlich & Davis, who are policy backers, and if a member of a firm of policy backers he was then an aider and abettor in this business of policy, and being an aider of the policy backers—that is, lottery policy—he then becomes a principal in the case with them and subjects himself to liability to punishment for that offense. Therefore it imputes to him according to the definition of the case here, not only the crime, but it likewise holds him up to contumely, and does it not hold

him up to the citizens of Baltimore in a light other than that which he has a right to be held up in as a citizen, if he has not violated the law such as they say he has in this case? I will show you beyond the shadow of a doubt that there is not a scintilla of evidence here showing that he has violated the law in any way, shape or form. I read further:

“Or dishonorable conduct, or that he be suspected of such conduct, or to suggest that he is suffering from any disease,” and so on, “which has a tendency to injure him in his office or calling or trade,” and so on. All these things spoken of here are slanderous if not written, and those words that are written make the writer indictable for misdemeanors. What has this jury before them? Lord Hale says “that an indictment is a brief narrative of the offenses committed by any person and the necessary circumstances that concur to ascertain its fact and its nature.” Now, what else have we? An evil intent. That is in the nature of a libel. We are ascertaining all the facts and circumstances necessary in connection with this matter to ascertain its nature. An evil intent is in the publication. The State does not have to prove in this case that there was a hatred or ill-will or grudge. Nothing of that kind or character. I read you the law in the opening statement, that in a case of this kind the idea of malice is an idea inferred by the law, put in the case by the law itself. The malice is an inference of law. When a thing is done without just excuse or provocation, that act is a malicious act, and has in it the evil intent necessary. Every one of the decisions in these cases from time immemorial lays down as the law away back from the commencement and concluding the history of criminal procedure in all its grand history, “an evil intent is a conclusive inference and presumption of law from the publication of the libelous matter without excuse.” Therefore, for a man or men to publish an article without excuse, as our Code says, they have the right to justify it. According to the language of the Code, they may plead in justification the truth rather of the libel. This is the excuse that they must offer in a court of justice.

And in the case I have here of *Richardson v. State*, so strongly is that looked upon as the law by the Court of Appeals, that they say: "That finding the indictment sufficient, we turn to the rulings on the evidence, because of which this appeal is taken, and we find the Court ruled rightly. The evidence offered was avowedly only to show that the defendant had been led into an honest mistake."

That was the testimony offered below in the case of *Richardson v. The State*. Testimony was offered to show that they had been led into an honest mistake in the publication of the libel. But what does the Court of Appeals say on that subject? "The evidence avowedly was offered to show that the defendant had been led into an honest mistake of fact and therefore had been misled as to the publication set out in the indictment."

The Court of Appeals say: "Nothing short of evidence tendered to show the truth of the charge can be admissible under our statute." The statute I speak of is indexed under the title of "Libel." "Nothing short of evidence tending to show the truth of the charge can be made admissible under our statute, allowing the truth to be given in evidence, in justification under the general issue." Article 75, Section 15, of the Code of Maryland, says: "In case any person shall be prosecuted by indictment or in criminal prosecution for libel, the party so prosecuted shall be entitled to give the truth of the matters charged in the said indictment or other prosecution in evidence under the general issue by way of justification." Nothing short of that, says the Court of Appeals, can come in under our statute.

Nothing short of that or evidence tending to show the truth of the charge can be made admissible under our statute allowing the truth to be given in evidence in justification under the general issue. Therefore, when you come to examine this case, gentlemen of the jury, you see that you have the words spoken; you have the words charged in the indictment alleged to have been spoken falsely and maliciously, and at the same time you have the enunciation of the decision of the

Court of Appeals of Maryland that when the words which are spoken are libelous and shown to you that they are libelous, the fact of publishing these words makes them guilty of the evil intent necessary.

Is it not a plain law? Is it not a wise law? Is it not a just law? Is it not founded upon every principle of equitable consideration? When a man speaks a thing of you, do you not want him to speak the truth, and if he speaks the truth of you has he not a right to speak it if he wishes to, but do you not want to know that it is the truth? He has a right to know that it is the truth, and unless he makes it known to you as the truth, has he a right to speak it? Has he a right to take the advantage he has of being the editor of a paper or being connected in any way so as to give publication in a large city like Baltimore—has he a right to say to the community that you are connected with lottery policy, no matter how nefarious lottery policy may be, no matter how steeped in vice those who are connected with it may be? Has he a right to charge any one of this jury as citizens, has he a right to charge any one without being able to prove it?

That is the way you look at a case like this. It is the only way you can look at a case like this, and unless they are able to prove it, then beyond all doubt they are responsible.

Now, you know the matter you are trying. We proffered in the opening statement the part of the libel that we relied upon. We told you virtually this: That all of these other people, as charged in that article, may have been guilty of violation of the lottery law; they may be backers of policy, but unless there was a meeting of the backers of policy and unless at that meeting of the backers of policy the representatives of the firm of Herlich & Davis, of which Fledderman is said to be a member, unless he was represented there and unless it could be shown here, then the jury have no consideration in the case, excepting that fact and that fact alone.

Now, that is fair. If it is not fair, why not charge the foreman and then fail to prove it, as they did in this case?

Why not prove it? Have they proved it? Have they

offered a line of testimony to prove it? Not one, gentlemen of the jury, and, therefore, what difference does it make in this case? You are considering this case on your oaths according to the law and according to the evidence. I say, what difference does it make to this jury whether or not there was a meeting of policy backers; whether policy was rampant? And you must take with a grain of salt some of the extravagant statements of counsel in arguing as to its being rampant. It is always met and met properly in a court of justice. There is a difference in trying a case in a court of justice, under the consecrated rules of procedure, and the trial of a case in a community, by a newspaper, wherein those who render judgment render it upon illegal testimony and as the result of a bias that cannot be reached by reason, the test that is made to a juror when he enters this sanctuary of the jury-box.

Let all those matters pass. Through me they do not deserve consideration or answer. I care not for them. I say to this jury and in the hearing of the community, that in no manner, shape or form have any of the matters that they have mentioned here been called to my attention officially, or in consequence of the position that I hold, or else the records would bear evidence and testimony of that fact. That is the answer.

I ask you in all fairness, I ask you in all sincerity and in all earnestness, because I know the intelligence of this jury, I know the desire of this jury to get at the facts and the circumstances of every case that they have tried here; I beg you as honorable men to listen to what I am saying. I ask you to ask yourselves this question, whether or not it makes any difference in this case whether these two men were there and they represented the firm of which Mr. Fledderman is charged with being a member? That is the question I ask you. Here is the indictment. The indictment charges this language to have been spoken. Was it not spoken? What I mean by "spoken" is, was it not written and published? There can be no doubt about that matter.

Now, have they proved the truth? What case have the jury before them to decide? If they cannot prove the truth of the charge, my answer to them is, "You should not have published the libel." That is the only answer; that is the only sensible answer that can be given to them upon the subject. "If you cannot prove the truth, why did you publish the libel?"

Now, it is very evident from this case, beyond all doubt, if the jury will look at it as they should look at it from a knowledge of the case as it has proceeded here, that at the time they published that matter as contained in the indictment, they did not know the truth of it. They did not know the truth of it. They published it at random, haphazard. They published it perhaps after it had gone through the brain of one or two men who had not the judgment and firmness of conviction to know the effect of publishing it without having the proof.

I say, from the testimony in this case, the evidence, and I speak of the evidence and confine myself to the evidence in this case, they did not know the truth of that matter, because it did not exist.

I say, from this case, that there is not a scintilla of testimony to show that Mr. Fledderman was ever a partner of Davis. I go further; I say there is not a scintilla of testimony in this case which goes to show that ever a firm of Herlich & Davis existed in the City of Baltimore. I go still further and say that there is not a scintilla of competent testimony in this case to show that there ever was a meeting held in the City of Baltimore. I go still further and say that there is not only no competent testimony to show that there was such a meeting held, but that Herlich & Davis have not been shown by the testimony to have been present at that meeting, and, therefore, the entire, absolute libel is made out at once.

Gentlemen of the jury, if the testimony is here, and I desire in the hearing of this honorable Court and the assemblage present to state nothing but what I believe to be true—if the testimony is here, where is it? I will make out these

propositions and then I will stop, because you always want to know when a lawyer is going to stop. I always like to know myself. I say that at the time that they published that libel they did not know it was true. Why do I say that? I simply say so because if they knew it was true they would have proved it in court. The very fact of going around, fishing as they did, through the testimony here to get the testimony to know whether it was true, shows that they had not a knowledge of the truth of it at the time they published it.

What else does it show? What has been the effect of the testimony? What has been the effect of the testimony attempting to prove this? Before I go to another point, let me anticipate the defense. The point of it is this: Witnesses have come upon the stand, and they have said: "I won't answer that question; I won't answer that question, because I have a right and a privilege as a witness not to answer." Therefore, talking from their side, we cannot get, gentlemen of the jury, these people to come in and to give us so and so, and so and so. The witnesses, according to the decision of his Honor, had a right to answer or not as they pleased. They determined not to answer. Well, gentlemen of the jury, how can that affect your minds in any way, shape or form? If it were a good principle for them, was it not a good principle for us? Why, when they put Mr. Hussey upon the stand, was he not the first one who suggested to his Honor, "I will not answer." He asserted his privilege. He opened the door for his privilege; his privilege was accorded to him, and if it were accorded to him, why can it not be accorded to these other people? That is the way we look at it.

Then the other witnesses who came upon the stand to testify as to Mr. Fledderman's connection with the partnership of Herlich & Davis. They did not claim any privilege. When the editor of a reputable journal, a Sunday paper, *The Telegram*—do you forget that testimony? Do you forget the testimony and their own testimony, the testimony of Mr. Virtue? Do you forget the testimony of all these other witnesses upon this line, reputable people, people against whom



not a breath of suspicion can be breathed? They come upon the stand and they testify to nothing of any kind or character detrimental to the interests, as far as Mr. Fledderman is concerned in this case, or to anything that he did in that saloon other than to go there as a citizen would go quietly to enjoy himself socially, as he had the right to do as an American citizen. That is all you can gain from that. You cannot take anything else from it. Is there the slightest testimony from any one to prove from the testimony the occupation of the gentleman, and because once or twice, maybe, he has met these men there and talked with them, that he was a partner of them any more than he was a partner of Mr. Virtue, or a partner of this other gentleman, the editor of *The Telegram*, Mr. Cook, or of these other gentlemen who came here and testified? Not the slightest.

The jury are as much warranted in drawing a conclusion from this testimony as to his being a partner with these other people as they have to draw the conclusion that he is a partner of Herlich & Davis—just as much warranted, gentlemen of the jury.

I have forgotten the name of the gentleman who kept the saloon—Mr. Adler. Poor Mr. Adler! He is the only one who seems to come out of this matter, because really all that we can hear, all that we can understand, from that testimony, is that he keeps the best beer in Baltimore, and possibly the best place to get a glass of beer. That is all. That he keeps the best beer in Baltimore, and it is a good place to get a glass of beer and it is a social place to go, because Mr. Rosenbaum, reputable merchant of the City of Baltimore, takes his wife to that place. There is nothing wrong in that; there is nothing wrong in a man going into a place of that kind and character.

Yesterday, under the heat and excitement of the trial, I almost wished I was up there myself, enjoying the sociability of the occasion. What can there be in a matter of that kind? What kind of testimony is that to produce in a court of justice for the purpose of defaming a man. What sort of testi-

mony is that to produce in a court of justice for the purpose of showing a grave issue in a trial like this? That is all it means.

It is an advertisement for Mr. Adler and nothing more nor less. I say, gentlemen of the jury, look at this testimony, every line of it, that has been produced here, and see whether you can draw any honest, intelligent conclusion that Mr. Fledderman was connected with policy in any way, shape or form, that any such firm of men as Herlich & Davis ever existed. The nearest they came to it was by a police officer—not a police officer, but Mr. Hamilton, who testified that he had gone bail for them, and he said they came to him separately. He did not say they came together, so as to make the partnership shown, but Mr. Davis came once and Mr. Herlich at another time. I want you to be fair, and if that shows anything, it only goes to show that Mr. Davis or Mr. Herlich were interested in some way—he said the men were friends of theirs. It turned out to be a colored friend of his. It does not go to show that they were both interested in that one man so as to show the partnership. That is all the testimony that goes to show that.

I have said, and I say it again, that there is no testimony here to show that they knew the truth of this statement as contained in the libel at the time they published it, because if they knew it the evidence would have been on the stand, and if they had it at that time they could have offered it in evidence here.

So, we have the case in this way. Instead of having the proof, instead of having the case here as proved according to the allegations of the indictment, instead of having it proved by the State, you have it proved by the defense. In other words, the defense comes here and shows that Mr. Fledderman had nothing to do with it. These people who have known him, and who have associated with him, these people who have met him at various places, none of them ever knew anything about his being connected in any way, shape or manner with lottery policy. Is not that the sum and sub-

stance of the testimony of all the witnesses as brought out here? Therefore, gentlemen of the jury, if that is so, what excuse have they offered for the publication of this libel? They do not deny the publication. They cannot deny the law in the case as to the evil motive in the publication. They have not justified and they cannot justify that by evidence, because it does not exist.

Now, look at it fairly and impartially. Have they proved the truth of the libel as contained in this article? Now, ponder over that. That is the consideration that the jury must make in this case, because if they have not proved it then they are responsible for the act. It is very well for people to be bold. It is all very well for people on the outside to put on braggadocia and to assert this, that and the other of another. They may assert that boldly on the outside, but when they come into a criminal court and are unable to charge that against a man, are unable to prove the truth of it, the very least thing they can do is to say they were mistaken.

There is not a word, not a scintilla, of testimony upon that. Therefore, what is this jury to do, this jury sworn to try a case of this kind and character according to the law and according to the evidence? The law I read you. According to the evidence, the evidence is that the publication was made. The evil is done to the man, it is the law. And the truth is not put in evidence by the defense. Therefore, the libel stands just as it was. How can a jury justify a verdict of acquittal in a case like this? How is it possible to reconcile an action like that with their sworn duties and the evidence in the case is such as it is, and when the testimony of the defense falls so far away even of attempting to show a justification?

Now you may talk about justice having its play in the City of Baltimore. You may talk about the machinery of justice and how it should work in the City of Baltimore. You may talk about the connection of officials with the administration of public justice in the City of Baltimore, but I say to you,

gentlemen of the jury, whenever it becomes known to the citizens of Baltimore that a jury of intelligence, taken from that city, representing the peace, government and dignity of the State and the majesty of the law, renders a verdict in a case upon sentiment; when a jury renders a verdict in a case upon matters that are not in the case, when they are sworn to try the case according to the law, and according to the evidence, they at once stab the very foundations of the edifice erected to maintain justice in the City of Baltimore.

Here is where it comes. Men may talk as they please upon the outside. Men may talk about the manner in which trials are carried on, but unless these self-same men at once relinquish their paper certificates as honoray members of the Fifth Regiment and come into a criminal court and stand as judges upon those crimes and do their duty in the jury-box, where the duty alone can be done, and where the evil can be rectified, then we had better have at once a cessation of all this cavil and veriest nonsense that is disseminated throughout this community. There is the point. When a jury performs its duty, when a jury stands up manfully in the face of the law and the testimony and performs its duty, then you have a rectification of those evils that are talked of so much before juries.

There is the solemn sanctuary wherein the evil can be rectified. When men go in that jury-box, seat after seat occupied, they become then in the eyes of the community the judges of the evil of a great State. They become the judges of trials and issues that are brought into a court of justice, and the importance of their action, the importance of the duty that they have taken upon themselves in the case, must at once be apparent to them upon the slightest reflection. There is where the liberty and bulwark of society is built up. Let it be known that the jury, representing the law and the fact, are careless, are indifferent, are swayed by prejudice, are swayed by methods, are swayed by feeling, then at once you let it be known that the fountains of justice have been corrupted.

That is the way to look at it; and therefore, gentlemen of the jury, I again press upon you the importance of the great duty that you are performing. I have no feeling whatever in the matter. I have nothing to gratify in this case but the performance of my duty. I beg you to perform yours by looking at the testimony in the case, and when you will have looked at the testimony in the case, you will find that a slander has been uttered, that it has been published, and that an opportunity has been given them to produce the truth of that slander in a court of justice, and that they have failed, and signally failed, in the production of that testimony, and, having done that, they, and they alone, are responsible for the consequences of their malicious, defamatory and unlawful acts.

MR. MARBURY, FOR THE DEFENSE

*Mr. Marbury.* If your Honor please, and gentlemen of the jury, I doubt very much if in the experience of any of us here a case has been submitted to a jury of Maryland men involving issues of a graver character than those which are involved in this. The question of the extent to which the administration of the affairs of our free government is the subject of legitimate criticism on the part of citizens, whether that criticism takes the form of a verbal comment or published criticism, is a question than which none more important can ever come before a jury for consideration; it is a question around which the battle of civil liberty has been fought for centuries; it is a question which is historic, not only in the history of the law, but in the history of the development of the Anglo-Saxon race, and the considerations which are raised in your minds require you to deal with the question on that ground as being of the greatest possible gravity.

Gentlemen of the jury, I do not propose to take up any great part of your time in dealing with that aspect of the question, but it is my desire, not less than that of the learned counsel who preceded me, to do what I can to impress upon your minds the extremely grave character of the question that you have to decide. My brother remarked, and endeav-

ored to impress it upon you that it was most important that we should not go outside of this case in determining the issues. Gentlemen of the jury, the warning was unnecessary. The spectacle presented in this court room yesterday before this jury rendered it unnecessary to go beyond its walls to see the most remarkable exhibition known in the history of criminal justice in Maryland. The spectacle of a number of acknowledged, self-confessed criminals coming upon the witness stand with the knowledge that every word published in these News articles was the truth, claiming the privilege of refusing to answer the question, because they would criminate themselves if they told the truth, and then having the hand of the State's Attorney lifted to seal their lips and keep the truth back; and the utmost vigor and energy, not only of the State's Attorney, but of those who are his assistants, not for the purpose of convicting the criminal, but of defending and justifying the criminal to keep the truth back which would keep these honest men from going to jail or paying a fine, suffering the penalty of that alleged crime which they are said to have committed.

You do not need to go outside of this case to see the most lamentable spectacle of the administration of criminal justice in Maryland.

Now, gentlemen of the jury, what is it that they are trying to do here? They are trying to send to jail or have severely fined a number of gentlemen who publish a newspaper in this city, for doing what? Let us see what. They filed this indictment against them after they had been indulging in criticism, whether it was just or proper it is not for me to say in this case, but they file this indictment in which they charge these gentlemen with having published a long article in which it was stated of a number of men engaged in this policy business that they stop for awhile, that owing to the publication in *The News* and its exposure they stop, but that subsequently they had recovered from their fear and determined to renew the business, and a large number of persons engaged in this business had assembled at a particular place

and held a meeting and there resolved to resume their nefarious business.

It mentioned the names of different people who were there, a large number of them, amounting to thirteen in all, I believe. It said that the thing could not be carried on except under the protection of certain officials. Now, gentlemen of the jury, that long article which was read to you the other day notwithstanding the objection of the State's officers who desired to hold us down to a mere technicality, that long article contains charges of the gravest kind, not merely against Mr. Fledderman, who is mentioned in the most incidental possible manner, but against a vast number of people, alleging that his "policy" has permeated the body politic, that it is rotting and sapping its very vitals, permeating into the morals of the people, and that it has gotten so strong that the criminal law is not strong enough to hold it back; that is what is said in that article.

Gentlemen of the jury, did they indict The News for saying that? Did they dare indict The News for saying that? Did you ever consider that question? No, they did not dare to indict The Baltimore News for saying that. On the contrary, after looking over that whole article, the only thing that they could find upon which they thought they could with some safety rely and find a jury that could convict, because of the supposed difficulty of the proof on our part, was a mere passing allusion to one of the parties mentioned. And that was Mr. Fledderman; Mr. Henry G. Fledderman. Now, gentlemen of the jury, if what The News said about that whole thing, in all the rest of that article, with reference to this whole system of rottenness of the administration, here in reference to these policy people, was not true, it was the solemn duty of the State's Attorney to have indicted them for saying that, and not to pick out a mere little particle of that long article, even if he had thought they had made a mistake in reference to a particular individual.

But so far from doing that, in order to secure what they thought was a technical advantage, a technical advantage used



for the purpose, not of defending a man against the charge of crime, but for sending him to jail, in order to gain what they considered a technical advantage, or from fear to meet the issues raised by these charges in the paper, they absolutely come before this jury, and not only do not deny that they are true, but Mr. Bernard Carter stands up here and admits, that they were true. Confesses. Gentlemen of the jury, confesses. I hold his words in my hand. Confesses that every line of that article is true, except the little portion which he claims to have selected to make the subject of controversy in this case; at the close of his argument day before yesterday. Why, it made me start when I heard it—I confess it made me start when I heard these words fall from the lips of the counsel of the Police Board of Baltimore. At the close of his speech he says: “Now will your Honor allow them to go into the proof of the horrible character of this business, of the efforts which The News has made to break it up; of the description of it which was given in the issue of January 25, when under the disclaimer, if disclaimer you choose to call it, of the State’s Attorney, none of these matters are in issue. All may be taken for granted as true—and the only thing that the State says is libelous, and which you must prove to be true before you can answer this averment, is the averment that Mr. Fledderman was a member of the firm engaged in this business.”

Now, can any decision more absolutely dispose of this case than that? Now that is what Mr. Bernard Carter says. “It says first that the State’s Attorney may abandon any part of the alleged libel that he pleases, and then that the whole subject matter of inquiry before the Court shall be confined to the truth *vel non* of the allegation on which he plants himself. How under that, your Honor can allow these traversers to go into a proof of these facts which nobody disputes and which the State concedes, and which therefore are, so far as this jury is concerned, not an open subject of inquiry, I confess myself unable to understand.” Gentlemen of the jury, I begin this argument and I desire to make it to you in this way

for the purpose of showing you precisely what it is that this newspaper has claimed to have done, and for doing which you are asked to convict these editors of a criminal and malicious libel; that they published an article going into the greatest minutiae, giving all the details of a ramified system of crime in this city, which all good men would like to see rooted out and all honest men must repudiate, and because as they allege we will satisfy your mind that they did not make any mistake before we get through with this case, because the State alleges that in that long article the single mistake occurred, consisting in the erroneous mention of one of the numberless men there mentioned as connected with policy; that because they made a slight mistake in that article, that you must send them to jail for it, or convict them of a crime which would make them liable to punishment. That is what the State's officers are asking you to do. Do you think so, gentlemen of the jury? Do you think that the interests of the State of Maryland require you to do a thing of that kind, or is it in rather the interest of Mr. Fledderman? Who do you think is prosecuting this case? Who is Mr. Fledderman, that he should have such sacrifice made for him, that he should have the State's counsel, and in order that his private purposes may be subserved, and in order that his critics and his enemies may be punished, all his compatriots, all his fellows and associates with whom he meets and associates from day to day, shall be confessed before this community as being guilty, while he alone is the immaculate innocent. It is the first time that I ever heard of a claim of that kind made on behalf of a man that did not have the courage to put himself on the witness stand and let me put him to the test of a cross-examination. I have had him there before and he knows it.

And yet it is for him, gentlemen of the jury! it is for him—it is for his vindication that you are asked to send three respectable gentlemen to jail or subject them to the penalties of a criminal libel. What has become, gentlemen, of your good red Anglo-Saxon blood, if it does not rebel in every drop against the suggestion of such a thing as that? And how:

by what means is this object sought to be accomplished? Upon what principle? Let me show you that. Why, gentlemen of the jury, in the first place, look at this case. You see gentlemen, we are not prosecuting these people. They are after us. They raised the issue and we are forced into court to meet it; gentlemen of the jury, we are not afraid to meet it and meet it like men, and we will leave it to you when this trial is over to determine whether we have flinched from the fight.

But I want to show you now what it is that the State of Maryland must prove. That, if you please, Mr. Fledderman must prove before he can ask a jury of Maryland men to do his bidding in such a case as this. I will read you, in the first place, an extract from one of the books most frequently cited in this court: "Bishop on Criminal Law," section 211.

"Technical rules, though necessary in the criminal law, are not to be carried to results plainly detrimental to the public repose or to a sound administration of the judicial system. No theories, however fine, should ever persuade a court to pronounce against the defendant a judgment to which the conscience of mankind will refuse to respond. When, as it has happened, it is seen that a proposed judgment is of this sort, and the Court feels an inward prompting to continue the case expressly to give the defendant an opportunity to apply for a pardon, the further question should be carefully revolved, whether or not the decision itself is sound in law."

And again on page 287, section 87, of the same volume:

"No crime without evil intent. There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness, without which it cannot be, and neither in philosophical speculation or in religious or moral sentiment would any people in any age, allow that a man should be deemed guilty unless his mind was so.

"It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist. We find this doctrine confirmed in many cases. The ancient wisdom of the law, equally with the modern, is distinctive on this subject. It consequently has supplied us with such maxims: the act itself does not make a man guilty unless his intention were so, and an act done by me against my will is not my act, and so on."

Now, gentlemen of the jury, that is the basis of law, upon

which we rely in this case. Before the State, as we understand the law to be, can ask for any conviction, it must satisfy your minds that this article—not merely that the article was published, but that it was published with an evil intent; that it was published as the indictment says, with intent to injure, vilify and prejudice one Henry G. Fledderman and deprive him of his good name, fame, credit and reputation. That this whole thing was done for that purpose, gentlemen of the jury; that they got up this great long article with such expense, with such care, involving statements which have involved such an enormous amount of labor on the part of the editorial force of *The News* and costing, doubtless, thousands of dollars for the work; that they did all this for the purpose of injuring the good name and fair reputation of Mr. Fledderman. That is what you have to find; that is the intent with which the article is charged to have been published; and as the law which I have just cited to you shows that no man can be convicted of a crime, unless you can prove that it was done with an evil mind. Now, what does my brother Campbell offer to do; how does he endeavor to get around that?

He read the authorities entirely misunderstanding their true meaning. He read the technicalities of the law here, to the effect that if you found the statement contained in that article were not true and intended to reflect on the character of the person mentioned, that no matter what the real intent and true purpose and object were, the law would infer in view of this publication an evil or malicious intent. I have heard that men might be acquitted on a technicality, but that any American citizen should be convicted on a technicality, I never heard until now. That a jury, satisfied though they be from a consideration of all the facts and circumstances of the case, that this article was published not with any intent to do any harm to Mr. Fledderman, whose name was only incidentally mentioned in the article and satisfied that the intent of this publication was to do all in the power of this newspaper in the interest of public morality and decency to rid this city of a public pest, and although the jury found that although *The*

News published this article for the benefit of the public, the jury nevertheless must find that they did it with a malicious purpose. I reply to that argument by referring to the general doctrine to the effect that "the rules necessary in the criminal law are not to be carried to results detrimental to the public repose," and so on.

You sit here and you are the judges of the law as well as the fact. Gentlemen of the jury, if that doctrine cited by my brother, if it stood nakedly as thus laid down, even though it might have been enunciated by the highest court of this land, it would still be for you to say whether under all the circumstances of this particular case you would apply that doctrine, if you thought that by so doing you would not meet the ends of justice. I dare any man to challenge that statement. If that be not so, why is it that the question of determining what was a libel and what was not a libel was taken from the bench; taken out of the hands and jurisdiction of the judges and placed in the jury box? It was this, gentlemen. Experience had shown that that was the only safe place to put it, and the explanation of why it is that we find in the organic law of Maryland, in the Constitution of this State, an express provision that the jurors and not the judges are to be the judges of the law as well as the facts in criminal cases, was primarily because in England, where the officers are appointed by the Government, they were punishing the people for criticising their creators, the Government, and in order to prevent the accomplishment of what my brother is trying to accomplish here, of condemning the men who are really innocent to punishment upon technicalities.

When it comes to the rulings of the Court the judges often decide against what they deem right and just as expedient for the public good under certain circumstances of a case, simply because the Court is bound down by the sharp technical law. It is often true that that which is not just is law, but nevertheless the rigid applications of the rules were injustice none the less, and judges are often sorry enough to have to decide questions as they sometimes must decide them.

When that question was presented here yesterday by this man upon the stand, with a full knowledge of this whole business, with a full knowledge of this miserable business of policy in the City of Baltimore, I believe that there was no man within the sound of my voice, not excepting yourselves, who felt sadder and more regretful under the peculiar circumstances of the case because of the fact that the law had given those people a privilege of the kind which they took advantage of, than the Judge here on the bench. But of course the Judge has to so decide. There was no question about it. Now, gentlemen of the jury, the law foresees that, and the makers of these laws have foreseen all this, and they determined to take the responsibility from the Judges in criminal cases and put it in the hands of the jurors, in order that they may do justice, and any technicality that my brother relies upon must melt like snow under the sun in arriving at a verdict by a jury sworn to render justice between man and man.

My brother speaks of your having been sworn to give a verdict according to the law and the evidence. I noticed he made a slight mistake in speaking of the juror's oath. At first impression it might not appear to be important, but in the light of the constitution of his own State it has great significance. You are not sworn, and the oath is not that you shall properly "try the issues joined and give a verdict according to the law and evidence," but that you shall give a verdict "according to the evidence," and you are to be the judges of what the law is, and you are to let no law cross this bar which interferes with the administration of genuine justice and right in the case.

Let us come down a little more closely to the question at issue. I say in the first place that the State has no right, nor the counsel for the private prosecutors in this case have no right, to demand any conviction or to ask a verdict unless in the first place they show to your satisfaction that this article was published with a malicious intent. It is for you to determine upon the considerations which I have been attempt-

ing to suggest to you, and upon an examination of the whole article, whether that was a good intent, an intent to do good to the public, or an article intending to do harm to Mr. Fledderman. I say they must prove that first, and I submit to you with great earnestness that they have not proved that this was done with malicious intent, and there is nothing in the circumstances of this case to suggest that that article was published with any intent to injure Mr. Fledderman in any degree whatsoever. That is the first proposition.

But let me go a little further on the same line. I have based this argument heretofore on the assumption that my brother's views of the law were correct. In reading from the same case from which he quoted, the case of *Richardson v. the State*, I find that he did not emphasize the language there as strongly as he might have done with respect to one feature of this decision of our Court, as it seems to me. In the course of the opinion in that case (and it was a case where a newspaper had published an outrageous article on a judge sitting on the bench, and vilifying him in every shape, form and manner, and went so far as to accuse him of corruption) the Court says:

“An evil intent is a conclusive inference and presumption of law from the publication of the libelous matter without excuse.”

You must not only find that the article is libelous, that is to say that it is calculated to injure a man in his credit and reputation, and that it is false, but that even if it be false, even if it is libelous, in that ordinary sense and calculated to injure his reputation, you must also find that it was published without excuse. Can anybody say that *The News* has no excuse for publishing an article of that kind? Can anybody say that the situation in regard to this policy business was not such as justified a publication in regard to it? Can anybody deny that when it was seen here and when the fact was brought out that there were at least 40 policy shops in full blast carrying on the business so publicly and notoriously that the reporters of



The News had not the slightest difficulty in walking in these places and getting policy slips and having the evidence in their possession, and yet no punishment is to be meted out to these criminals? Can anybody deny, under these circumstances, that a newspaper had an excuse for publishing a statement calculated to break up this business? Therefore, taking my brother's view of the law, taking the narrowest possible construction and giving full force and effect to all his technicalities, which are generally used by clever counsel, not for the purpose of punishing innocent men, but for the purpose of saving guilty scoundrels—I say, giving full force and effect to all the authorities he can bring to his aid, still he has not shown and cannot show to this jury or this community that that article was published without excuse and justification. I say, if there were not ample excuse for the publication of that article, what would be an excuse for it?

What situation could arise that would better afford an excuse for the statements contained in that article? It was an article true to the letter according to the confession of the State, except as to some minor details. I am arguing this case on the assumption that all they say is true. Assuming for the purpose of argument, and that only, that Mr. Fledderman was misrepresented in that article; that it was a mistake to include him among the great number of policy backers; assuming that that was a mistake—a matter with reference to which the most carefully conducted newspaper might easily go astray, I ask is that a matter for which these gentlemen, after rendering such a great public service as this, ought to be punished by a jury of their countrymen? Why? Because it is an injury done to the reputation of Mr. Fledderman. You are entitled to your own estimate of value of that reputation. There is no legal evidence here to show that there is any such man as Fledderman.

But I say, assuming it to be true as charged by the State, that a mistake was made in that article in reference to Mr. Fledderman, ought that to be made the ground for the infliction of criminal punishment upon these gentlemen under all

the circumstances of this case. Is it pretended here that Mr. Fledderman ever called the attention of the editors or managers of *The News* to the fact that he had been misrepresented in that article? Has he made one suggestion about going to these gentlemen and saying to them: "These other people may be engaged in this policy business, but as to me you made a mistake. I associate with them every day. It is true that they are my constant companions and I have appointed one of them to office, but between man and man you are mistaken as to me and I wish you would correct the error." If he had done that, and after that *The News* had persisted in its statements and refused to make further necessary investigation to see if what they had published were true or not, then there might have been some excuse for his prosecuting this case in this way. But he did not do anything of the kind. There is no suggestion that he ever did anything of the kind.

On the contrary, it is perfectly obvious that he, imagining that he had got *The News* "in a hole" and not dreaming what a job he had on his hands, rushes to the Grand Jury and there prefers his charge, and has these gentlemen indicted for libel, intending thereby to close the mouth of the greatest enemy of "policy" in this country. If there is any animus in this case there is the man in whose heart it rests. "Shall we be frightened when a mad man stares?" For surely he must be a mad man when he undertakes such a task as this. It cannot be done. It cannot be that you can use these instrumentalities for closing the mouth of the boldest foe that this enemy ever dealt with during its rule of many years in this town. It cannot be that upon a mere technical error in an article that there can be found a jury that will do such a thing as to punish these gentlemen.

There is another matter that I wish to discuss, because it was spoken of in the opening of the argument. Counsel said, and I was astonished to hear it, that *The News* published this article recklessly and at random, without proper inquiry as to the facts. When he said that he knew or ought to have known and must have forgotten for the moment that the very rules

of law that he has been invoking through this trial deprive us of the privilege of bringing before this jury the facts and the information upon which that article was based, and that if we had offered to put that in evidence we would have been offering to put in evidence a thing which we had no legal right to offer and which would have been ruled out by the Court, and we would have been accused, as we were accused during other parts of the trial, of attempting to foist upon the Court evidence that we knew was not legally competent. That is another technical ground that shuts out the light of truth. It was decided in that very Richardson case that evidence tending to show to the satisfaction of the jury that the article in question was published in perfect good faith with an honest belief in its truth, was not technical, and legally competent in a trial of this kind.

If he had the right to disregard that rule of law, the same privilege ought to be given to us. He says that this publication was made recklessly, carelessly, and without information. Now, what did he know about it? He knew just as much possibly, or not quite as much, as counsel for the defense know. It was not published carelessly nor recklessly. It was published upon information, which, if it had been allowed to be brought before this jury, would have relieved this case of every conceivable difficulty, and would have shown to the entire satisfaction of the jury, as well as to the satisfaction of everybody else, that there is not a newspaper which would not have done the same thing if it had the public interest at heart.

Now do not misunderstand me. I am not pretending here that the editors of *The News* in publishing the article in question and in making this warfare against this policy iniquity have been actuated by pure motives of mere philanthropy and regard for the public welfare. I suppose they run a newspaper for profit, as other people do; but the control of a newspaper involves responsibility, and this responsibility for the proper use of the tremendous power which a newspaper has is such that when that power is being used, no matter what is

the motive to promote the ends of public justice and decency, and to suppress vice and to let in the light on the dark places of the town, to save the poor people from the most degrading form of swindling that was ever devised for the purpose of ruining the poor laboring man on the face of God's earth—I say when you find a newspaper using that power for that purpose, no matter what private parties might do, I do not see how—I can hardly describe it, but it seems almost ungrateful on the part of the public to punish them, no matter what wrongs they may have committed or what mistakes they may have made that have nothing to do with this case. What they have done here they deserve the thanks of every good citizen in this community for doing. Certainly they do not deserve punishment for doing a thing of this kind. Certainly they do not deserve the punishment that is meted out for the doing of a thing that transcends the limits of proper decency and which results in great injury as in the case of the act being done for a malicious purpose in attacking the private character of a man, and going beyond the limits of proper journalism, like going into a man's family and publishing his family secrets and making the paper offensive in that sort of way. I say if you see a newspaper doing that, I do not care what newspaper, you punish them at once, and teach them the proper limits and proper sphere of their duty. But, gentlemen of the jury, when you see instead of doing that that they are simply using their power for the purpose of suppressing a great public abuse, it seems to me they are entitled to praise and not to punishment to say the least.

I maintain, therefore, the State has not established in this case any state of facts justifying a conviction assuming everything they claim is proved. They establish no state of facts which would justify a jury in convicting these gentlemen. Assuming all they claim to be true is true, and that this article as to this particular gentleman was not correct. But gentlemen of the jury, let us look at the other side. What warrant have we for saying that that statement is true in regard to Mr. Fledderman, or rather, what warrant have they

for saying it is not true. In the first place, let me call your attention for a moment to what it is that has brought about this tremendous controversy. It is this thing they call policy. I do not know whether all of you gentlemen know what policy is. I confess I did not know it from a sack of salt when I first began to study this case. It consists, as I am informed, and I suppose it is a matter of common knowledge, of dropping 78 numbers in a wheel, 78 slips of paper on each of which there is a number, the numbers running from 1 to 78. These numbers are supposed to be dropped in a wheel somewhere down around Norfolk. I think the drawing at one time was in the Dismal Swamp, and at another time in Louisville, Ky., but lately, I understand, it has been down at Norfolk. They dropped 78 numbers in the wheel twice a day. Every day they draw out of this wheel containing 78 numbers 12 of those numbers, and then the numbers which are drawn out are put on a little list which is telegraphed to Baltimore or any other city where policy is played. You make a bet with a policy man that you can pick three numbers, for instance, out of the 12 that are drawn. There are various ways of betting, but I am informed that this is the most common way. This kind of gambling is something I do not indulge in, and until I become a lunatic I do not think that I ever shall. You make a bet that you can guess three numbers of the 12 numbers that are drawn from the 78 placed in the wheel. Sometimes they bet that the three numbers will follow each other in successive order. I am not expert at it, and I get my information second-hand, but I believe that is the game.

It requires a considerable knowledge of arithmetic to make a calculation of how many chances you have of being correct in your guess that the three numbers you name will be among the 12 drawn from the 78. I had a gentleman make the calculation for me last night of how many chances there would be of picking the numbers out in sequence, and the result was that the chance was one in one hundred thousand. Those are the chances you have when you put

your money on a policy ticket. Of course, it is only these ignorant darkies and ignorant white men who bet this money. Of course, no intelligent man would make a bet of that kind unless he has a disease that impairs his judgment. I mean by that that nobody of intelligence would follow it up as a steady thing except these ignorant fellows. These policy people bet the player, for instance, on some of the tickets 180 to 1, or \$9 against a five-cent piece, and the player lives in a dream of hope that he can draw a number giving him \$9 for five cents. The desire to get something for nothing seems as firmly grounded in human nature as any trait of our character. It is upon that weakness that these policy people play. They know that it is a great temptation to a poor man. They know that a poor working man has to do a tremendous amount of labor to make nine dollars, and if they can hold out the inducement that he may draw nine dollars for five cents by simply guessing the right numbers, it will influence him to play policy. They know that the very thought makes the poor man's heart light, and that is the temptation. That sort of thing means thousands of dollars every day to the people who back the game. It has been variously estimated that the receipts aggregate from five to nine thousand dollars a day. Nearly all this money is drawn from the poor people of this town. I heard a fellow say that he had seen a man standing at the door of these policy shops with his last five-cent piece in his hand, and hesitate whether he should buy a loaf of bread for his family or buy a policy ticket, and he generally bought a policy ticket. It was for the purpose of uprooting this evil that *The News* inaugurated this crusade. It was for the purpose of putting to an end a system of organized swindling which deserves no more the name of gambling than it deserves the name of being a religious service, that *The News* published this article, and yet they would have you believe that they published it wickedly and maliciously, with the intent of destroying the reputation of this gentleman.

I have attempted to show you what policy is. Now, what are the facts particularly in regard to this matter? What claim have they to ask you to find that this charge against Mr. Fledderman was false, or what claim have they to complain that the evidence we have adduced to prove it to be true is not satisfactory to their minds? If there is any doubt on the legal evidence in this case proving that charge to be true or false, whose fault is it? If the evidence which we have brought to your minds is not satisfactory to show that all this is true, whose fault is it that the evidence is not more satisfactory? You cannot say it is our fault. You sat here and watched the proceedings in this trial and saw what we had on our hands. You saw us call John Moan, who every man in this town knows has been the king of policy for years, and who knows everything about it from one end to the other, and who could have told the whole thing if he wished to. We had standing at his back a witness in whose presence he dared not lie, and he knew it, and we said, "Take off the seal of secrecy, and give this man immunity from criminal prosecution, and we will expose the whole business and prove that what The News said was not only true, but we will give you an opportunity to do what you were thirsting and hungering so long to do, and that is to convict these policy backers."

When the State's Attorney declined to do that thing, when he declined our offer (and it is not for us to say whether he was justified in his declination of doing so or not, for that is for him to determine) but I say, when he declined to take off the seal of secrecy he denied himself the right to demand a conviction at your hands in this case. How is it possible that the State's officer can raise his hand to stop a full investigation and at the same time ask you to consign our clients to a prison cell! All the ordinary feelings and sentiment of justice and of fair play would seem to have departed from their minds if the jury would convict under such circumstances. Is it to be supposed that because men are in a jury box that the law can by any tech-



nical language or anything of the kind deprive them of the right to use and exercise that sense of fair play and common justice which makes the difference between a man and a brute? Otherwise, how can it be supposed that they will hear him when he complains of the character of the evidence offered in proof of his case when at the same time the State's Attorney has shut the door as far as it is in his power against absolutely convincing proof? It is not for me to criticise his grounds for this. The witness Moan did not say whether he would testify or not as to the facts, but if Mr. Kerr had said the word he would have had an opportunity of finding that out. Of course, he might not have said a word, but I repeat that the reason the learned counsel gave was that he could not reconcile it with his conscience to let a man who confessed his crime escape punishment, although by extending this immunity to Moan he might, through his testimony, be able to convict a number of policy people who could not otherwise be convicted. But, gentlemen of the jury, it is for you to judge of the force of the reason given by the State's Attorney for his action in this respect. You have your opinion and I have mine. He is the State's Attorney, and whatever he says on the subject "goes." All I say is this, that in reference to Moan and all these other policy backers, and in reference to us, you must deal fairly. Mr. Carter and Mr. Worthington and Mr. Grasty are entitled to at least as much consideration at the hands of the State's officer, not to speak of the jury, as this array of gentlemen, who appeared here claiming their privilege yesterday. Certainly we are not going too far when we ask this. We are not making an extraordinary claim, not a claim of any special privilege, not a claim to be treated to more consideration than other people, when we ask simply that we be treated with the same consideration, at least as much consideration, as this collection of sporting gentlemen who were here yesterday, this collection of men who are generally called a gang of criminals.

That is all. That is what we are asking. Therefore, I

say, if the proof were not satisfactory, it would not lie in the State's Attorney's mouth to complain of it. But, gentlemen, let us look at it as it comes out. This News' article says that a meeting was held at Arbeiter Hall of policy backers, Herlich and Davis being among the number, in which it was determined to revive again, to start the boys out again and to write policy again. The same article stated that the effect—I read it to you the other day—of the publication and exposure made by The News on the 25th of January had been to close them up until that time. Mr. Carter admits that to be true; he admits that to be true in order to save Mr. Fledderman, because he dare not ask us to prove it to be true; dare not meet the issue as to whether it was true. He admits that to be true; no necessity for us to call another witness to prove that that meeting took place; no necessity to call these policemen and other people summoned here to prove that the business had been shut up and closed down by The News, that it was in full blast until The News took hold of it, and that they held a meeting to revive it, because Mr. Carter admits that to be true. He is the counsel for the Police Board and he ought to know. He has to admit it. A man of great logical mind cannot help recognizing the fact that unless that was true, that unless that portion of the article had been true that that was the worst part of the libel. Instead of indicting them for the little mistake, if it were a mistake, they ought to have indicted The News for the false statements in reference to the police and these other people. The only explanation he can give us as to why the indictment was framed as it was is that as to them the charge was true.

In addition to that, aside from the admission made by the counsel and involved in the form of indictment, you did not need any better evidence than what you had on that stand yesterday, when Moan and North and all those people came up and we asked them whether or not they were present at that meeting. They did exactly what we knew they would do, unless the State's Attorney did what we

asked him, unlocked their mouths—they declined to answer; they declined to testify. We asked them why they declined to answer, and they with one accord ultimately admitted that the reason they declined to answer was that by answering they might incriminate themselves. Of course, if they had not been at the meeting all they would have had to say was that they were not there. That would not have incriminated them. If they had denied being there the grand jury out in the other room would have indicted some of them for perjury before they could have gotten out of the door, and they knew it.

These things are not done in the reckless fashion that counsel seem to imagine. We would not have called these people unless we knew what they were. We knew that they did not dare deny that they were at the meeting, with the perjury law of the State staring them in the face. I tell you, gentlemen of the jury, this thing of criminal prosecution is a weapon that can be used by more people than one, and it would have been in the hands of men who would not have been afraid to use it against anybody if they had attempted anything of the kind.

That is the situation. We showed you beyond any controversy that that meeting took place just as charged in *The News*; that Herlich and Davis were among the number that assembled, and we showed you further than that by the testimony of Mr. Hamilton, for instance, that Herlich and Davis were in the policy business. Of course, if Herlich was there at the meeting as a policy backer, if he had not been there as a policy backer, he would not have been there, and you have a right to draw the inference the same as other people would draw the inference, from the fact that he refused to answer for fear of incriminating himself.

My brother here argued, and I must confess it fills me with a good deal of amusement, to see how he had to struggle with it, that there is no evidence to show that any such meeting had taken place. In other words, that means, gentlemen, another technicality, used for the purpose of punishing

people who are innocent, not for the purpose of protecting people. On account of another technicality you have got to close your eyes to the necessary, reasonable inference to be drawn from the facts which took place before you here. If you were not in the jury box and you asked a man if he were present at such and such a meeting, and he said, "I decline to answer, because my answer might tend to incriminate me," you would be set down as a "blooming idiot" if you did not understand from that that he was there.

It is argued by the State's Attorney that because you are in the jury box you have no right to draw an inference, which everyone outside will draw, and as you yourselves would draw if you were not in the jury box. If that be true, the sooner we get rid of the jury the better. We had almost sooner have anything else than a jury.

It cannot be open to doubt or to question that that meeting took place, and that Herlich and Davis and the other people whose names were mentioned were there. All we could get of them we put on the stand, and the rest have fled. I think you will find them down in Atlantic City and different resorts and different places. It is a great pity we could not have them here. It would have been a very interesting spectacle to have the whole crowd. It is not material, though; we had enough to show you what had taken place, that the meeting had occurred and that these people were present.

Now, gentlemen of the jury, not only did we show that Herlich and Davis were policy backers, but we showed that they were notorious policy backers. Mr. Hamilton, the witness who testified as to his having gone bail for their men, seems to me to place that question beyond any controversy. He testified that at the request of Herlich and Davis, both of them, at different times, he had gone bail for their policy men, their friends, as Mr. Campbell called them. The witness said they were colored men. What does a man want with colored friends writing policy. Does he get bail for them and pay for it, or even get bail, out of pure love and

affection? Why, Mr. Herlich must be one of the greatest philanthropists on earth. He must have been one of the original men who got up the cry about the oppressed darkeys some years ago, which has resulted in their having to work hard for a living.

I believe that the object of Mr. Herlich and Mr. Davis had in asking Mr. Hamilton to go bail for some of their boys was to promote the regular course of their business as policy backers. There cannot be any doubt on that subject. That is not all.

The witnesses who testified here toward the close of the day, several of them, said that Herlich and Davis were notorious policy backers; everybody knew that; that was their general reputation, especially in Alder's saloon, where they met them most frequently. Now, gentlemen of the jury, I say with reference to that, knowing the fact as Mr. Fledderman must have known it; knowing that they were notorious policy backers, if he chose to associate with them from day to day, to make them his common associates, and meet them nearly every evening in the same place, even if he did meet other people there at the same time, and if, in addition to that, he goes to work and takes one of them and puts him in a public office, puts this man Davis, who is engaged in the violation of law, puts him at the head of an office whose duty it is to suppress violations of the law, the Sheriff's office, how can he blame anybody if he gets the reputation of being a backer of policy? If a man associates with thieves, what right has he to complain if he gets the reputation of being a thief? If a man is the patron and supporter of a man engaged in this swindling, what right has he to send an honorable man to jail for giving him a reputation of being the supporter of the very man whom he is promoting to an office of public trust?

Gentlemen of the jury, we are getting down pretty close to the thing, it seems to me. I must confess that I was never more astonished in my life. I would not have been astonished as much as I was if I had known some things I know

now. If I had not known something from previous experience with the gentlemen I would have been extremely astonished that the State should close the case without putting Mr. Fledderman on the witness stand. This is the first time on record that I have ever heard of where, in a criminal trial for libel, in which the charge was made that a certain person had been made the subject of a libel, that that person did not have the courage to submit himself to a jury of his countrymen, and submit himself to the ordinary examination, to see who has been libeled or said to have been libeled, and to see what kind and character of man it is whose reputation is such a priceless gem that its destruction shall be punished as grievously as this. It is the first time in the history of all these trials where you will find a case where a man has been allowed to sit there, silent, sullen, to think that by his presence he can make this jury do his bidding in a case of this kind.

Do you think a man has any such right? What explanation is there? Why is it that such a thing has taken place? I say, gentlemen of the jury, that the evidence and the facts developed in this case called aloud for explanation from Mr. Fledderman, and he did not come. They called aloud for him to come upon the stand and explain them, and he has not come. Why was it that he met there every morning at the same place, nearly every evening, during years, two notorious policy backers. Suppose he had met two notorious policy backers. Suppose he had met two notorious criminals of any other kind; suppose he had met two notorious people who had committed any other crime and were known to have that reputation—suppose he met them there nearly every afternoon. Could he complain if some paper said that he was supposed to be connected with them? But if he goes further than that, and takes a man whom he knows has committed a crime, takes a man who has committed the crime of larceny, has been a thief, for instance, and puts him in a public office, makes him chief clerk of the Sheriff's office, is it not required that he should explain why he did that?

*Mr. Kerr.* I would like to know what evidence there is in this case to justify you in saying that to the jury?

*Mr. Marbury.* To justify what? •

*Mr. Kerr.* Where there is one word in the evidence in this case showing that Mr. Fledderman put a man whom he knew to be a thief at the head of an important office.

*Mr. Marbury.* Do you think I said Mr. Davis was a thief?

*Mr. Kerr.* I understand you to say so.

*Mr. Marbury.* I did not say what I might have said on the subject. I only used that as an illustration.

*Mr. Kerr.* I misunderstood you entirely.

*Mr. Marbury.* I did not go into that because I do not want to do any man any unnecessary injury. If you want to raise the question whether he is a thief or not, I will just draw the record on you in five minutes right in this court room. Now, I said nothing of the kind.

*Mr. Kerr.* I misunderstood you, then.

*Mr. Marbury.* Very good. I say, gentlemen of the jury, without going one inch beyond the record in this case that a man who gets money from other people in a way where there is no chance, one chance in a hundred thousand, of the other fellow getting anything, is not only not in a lawful business, but not in an honest business. It is not legitimate; it is not even fair gambling. There is not one man in a hundred who cares a great deal about gambling except strict church people, like Mr. Bernard Carter. There is not one man in ten thousand who cares a thing about gambling if it is a square game. If they choose to waste their money in that way they say let them do it. If they play faro or if they play hazard, or if they play rouge et noir or if they play any of the other games where they get a reasonable chance and where the house has only a reasonable percentage, why that is a matter with reference to which a majority of the people do not care very much. I confess I am not very straight-laced on that line, not as much as I ought to be perhaps. But I say when you come down to policy you are



stealing the people's money; you are not gambling at all; you are swindling.

Gentlemen, this is a war to the knife against that swindle. This is a fight to the finish between the policy men and the people who are going to fight them. You may choose which side of that fight you will take in this case. It seems to me there cannot be any room for doubt where honest men ought to stand in a case of this kind. When you find that the prosecuting witness here appoints a man whom he knows is notoriously engaged in that business to the position of chief clerk in the Sheriff's office, and keeps him there for two years, and you see that same man going off and getting another public office and holding it now, it is within the natural sphere of this gentleman's political influence, and we may draw our own inference as to how he got his present position; when you see him patronized in this way by the man who has instituted these criminal proceedings, with full knowledge of the facts and of his character, you have a right to ask this man why he does not come upon the witness stand and explain his connection with these people. If he was not supporting him in the policy business, why was it? Was it from a natural affection and love for that kind of people? Was it because he thought they were proper people for public trust? If he was not his supporter and backer, if he did not stand behind him in this whole matter, I would like to know who did. Until he has given some explanation, gentlemen, of these facts, until he has given some explanation why it is that he has done these things, that he has patronized and supported and backed these people to the extent the evidence shows that he has, until he tells us why he is the daily associate of a couple of swindlers like these, I think it is idle for him to ask for a verdict at the hands of an honest Maryland jury.

Now, gentlemen of the jury, I am sorry if I have had to weary you in this trial. I have done the best I know how to lay before you the considerations which, it seems to me, legitimately pertain to it. It is not a matter of the simplicity

which the State seemed to imagine at the beginning of this case. They seemed to imagine that all they had to do was to produce this article, to prove that it was published in *The Evening News*, and that unless we could prove it true to the letter, with all its details, its minutest details, that we would have to go to jail for it. That is what they seemed to think. If you will let them make the law for you, and likewise the facts, there will not be any difficulty; but, as I have attempted to show you, they would not only have to show to your satisfaction, if they could do so without putting their own client on the stand, that the statement made about him was false, and one calculated to injure his reputation, if his reputation could be injured, but they would also have to show that it was a malicious attack and not made with a good intent, or, as my brother seemed to think, that it was made recklessly. They would have to show, at any rate, that it was made without excuse, that it was not made with the design of doing the public a service, but that it was made with the design of doing injury to a private individual.

It may be true enough that they would not have to show personal hatred or ill will. That, of course, I do not suppose in any case is necessary for legal purposes. They would not have to prove any hatred or personal feelings toward Mr. Fledderman. I say, gentlemen of the jury, they would have to prove that it was done for the purpose of intended injury to him, no matter what the ulterior purpose was; that the article was written and published without legitimate excuse and with the purpose of injuring Mr. Fledderman. I say, gentlemen, again, if the object which they manifestly had in view in writing that article, and the circumstances concerning the whole situation at the time it was published, do not furnish a fair excuse, it is hard for me to see how any excuse could be found.

But, gentlemen of the jury, there is another feature of this case to which I want to say just one word in closing, and that is not the least grave or important of its features.

What is this prosecution, anyhow? How is this thing be-

ing worked? Here you see in this courtroom most eminent counsel. You see the regularly appointed State's Attorney and his assistant; you see a gentleman who is now counsel for the Police Board and who has been City Solicitor and has held various public positions; you see the City Counselor; all these public officials are brought into this trial. Anybody coming in and seeing the array of counsel would at once say, "They must be attempting to convict some great criminal; they must be attempting to root out some great evil." All the powers of the State to bear. If you had seen John Moan and all these fellows on the stand you would have said, "These are the fellows Mr. Carter and Mr. Hayes and Mr. Kerr are after; they have been perpetrating crimes which heretofore it has never been possible to fix upon them." But, gentlemen of the jury, I imagine a visitor would have been greatly astounded to hear that this array of official counsel was brought here not for the purpose of punishing any criminals, but to save them from punishment; to shield them, to interpose every possible technical objection to the evidence, to use every effort possible to keep out the whole and the real truth in the matter for the purpose of punishing these respectable gentlemen and letting these criminals go free. Not only so, but that the State officer has felt it his duty to make an announcement for the benefit of these people that he would not use State's evidence against them, which is equivalent to saying that nothing should be or could be done, and I think we know probably now why nothing has been done.

That is the spectacle. On the other hand, you see all these counsel brought here for the purpose of attempting to punish three gentlemen for publishing in a paper an article of a kind which appears in the papers in New York and other places every day in the week nearly. You see them engaged in bringing all the organized power of the city officialty, so to speak, all the power of the government together for the purpose of closing the lips of the best advocate, I really believe, and the truest friend in connection with this

wretched business that the poor people of the town have ever had.

Now I say, gentlemen of the jury, it behooves you to weigh this matter gravely and to ponder over it seriously, and to be careful in rendering a verdict in this case that you are not made the instruments of a gross injustice and oppression. If a lot of politicians—I do not care a straw to what party they may belong—if a number of politicians can get together and by their influence can have people prosecuted for attempting to uproot crime, and put to an end such a condition of affairs as exists in this city, it is time for honest men to look to themselves. It is time that this matter were considered more carefully than it has ever been considered before. It is time to consider whether the power of politicians should not stop at the doors of courts of justice.

If you let that thing go on, gentlemen of the jury, if you lend yourselves as instruments to the private malice of these people, you may find this town brought back again to the same condition that it was thirty years ago. There was a time when this courtroom was looked upon with horror by all respectable citizens of Baltimore, and some of the very men who stand behind the prosecution in this case were responsible for it in the old Know Nothing days; and if you allow yourselves to be used for the purpose of enabling John Mahon and Henry Fledderman wreak their private vengeance upon their political foes you will go a long ways toward bringing back to this courthouse to that condition in which it had fallen in those evil days, when it was so eloquently described as “that sink of iniquity, that pit of perdition, within whose evil walls no honest man enters without a shudder, and from which no scoundrel emerges without a triumph.”

I say, gentlemen of the jury, I ask you upon every principle of reason and justice, as you value your own reputations, do not do it.

MR. GANS, FOR THE DEFENSE.

*Mr. Gans.* If your Honor please, and gentlemen of the jury. I asked my friend and colleague, Mr. Marbury, to make the substantial speech before the jury in this momentous trial for the reason, among others, that during the whole of the past week I was confined to a sick bed, and therefore did not feel in the physical trim that I would like in representing the gentlemen who are here on trial, and by misnomers are called the traversers at the bar. I will endeavor, however, as far as the strength within me lies, to show to this jury, before I take my seat, that we have now enacted before your eyes one of the most extraordinary scenes that has ever been seen in the room of the Criminal Court. We have here, sitting in the criminal's dock, which for the first time in the history of the City of Baltimore, is the post of honor, three editors of a daily newspaper. We have on the other side of this litigation—now let me stop and ask the question: Who? I say, we have on the other side of this litigation—let me stop again, and ask the question: Who? Have we the State of Maryland, the grand old State that we all love so well, engaged in the legitimate and *bona fide* effort to maintain the peace and order of the community? Have we? Have we on the other side of this litigation the State of Maryland, representing in its official composition the good people of the State, the people who are fond of the maintenance of law, the people who want to see all kinds of crime suppressed, the people who would not encourage the open, notorious and shameless violation of either the gambling or the policy laws in this city? Have we the State of Maryland on the other side, and these editors on this side of the controversy? Not at all. Not at all. Now, why do I say that? Why? It seems to me to be perfectly clear, gentlemen of the jury, that the people who are on the other side of this controversy are the people who are in a conspiracy to carry on shamelessly this violation of the law. They are hiding behind the State of Maryland. The great shield of

the State of Maryland is put up and hiding behind it are these gamblers shooting their poisoned arrows. They did not come to the front until we dragged them from behind that honorable barricade. They did not come here willingly at all; we dragged them to the light of day and pilloried them with public opprobrium. What do they do? Why they take this unfortunate being here and they stand him out. He doesn't get behind the barricade.

That is, he did not when the indictment was found. He did afterwards, as I will show you; but they stand him out as the scapegoat, when it was understood that the firing was going to be too hot. It was not one of the most prominent politicians in the city that came to the front at all, but it was this man, who was put here as the figure-head of this prosecution. Why do I say that now? And I don't want to say anything unjust—God forbid that I should add to the accumulation of misery which ought to steep the soul of this man that sits behind me—God forbid that I should say anything untrue or make any enunciation that cannot be justified by the strictest kind of logical argument. We have been accused of talking buncombe in this court by counsel, not for the State, but by counsel for this man, simply because we were showing the truth of this particular transaction. Now I will ask you to judge as to whether in the argument which we are about to make, we are talking buncombe. Is the great State of Maryland engaged in the question as to whether the reputation of this man has been hurt?

Gentlemen, not at all. If the real question here were as to whether Mr. Fledderman has had published against him a thing, which is untrue, then Mr. Fledderman would have done what you, Mr. Foreman, would have done—what I would have done—I would have gone to these gentlemen publishing this paper, and have said, “Why, gentlemen, this is an infamous business—as Mr. Carter says in his speech—you have made a mistake in connecting me with it, and I will give you the reason for that mistake.” If he did not care to do that—and that was the course suggested by my brother

Marbury—if he did not care to do that, he could have brought his action for damages in the Civil Court, and in that action for damages he could have employed his own counsel, his own private counsel, and when he filed his declaration for damages in the Civil Court, he could have stated that The News published of him that he was engaged in the policy business, and that is all that he would have alleged, and the question would have been tried before a jury in the proper tribunal, and if that jury found that The News had maliciously libeled him, he would have secured a verdict for damages, and his reputation would have been saved and that would have been an end of the matter. But he doesn't do that. He must forsooth drag the State of Maryland into his private affairs; he must, forsooth, go and get the Grand Jury to indict these men. Now, indict them for what? For putting in this particular allegation that he was connected with Herlich & Davis? Oh, no. He must have them indicted for publishing this whole article, as you find it in this particular indictment. I say, therefore, if the Court and jury please, does it not seem to you to be perfectly clear that the object and intention of bringing this indictment was not to justify his reputation, because that could have been done by the proceeding which he is carrying on in another jurisdiction?

I will tell you why this was done. These policy backers and gamblers have been running riot in this city for some time. The officials whose duty it is to root out the evil, when they are asked about it, say, "We have no official knowledge that any such thing is going on; we have no official acquaintance with the backers of policy."

Well, gentlemen of the jury, if this trial has done nothing more, it has put the State's officers and the policy backers on a speaking acquaintance. If it has done nothing more, it has shown to the people of Baltimore who the backers of policy are, what their names are and where they live and what they are doing. Ah, gentlemen of the jury, that is what it has done. I say, therefore, that it is not the State of



Maryland prosecuting these people with respect to Henry G. Fledderman.

I asked the question when I started out; here are the men on one side of this controversy; now who is on the other side? Who is it? I say you have on the other side of this controversy, the gamblers of Baltimore, and I never knew that fact—and sometimes you can prove a fact by a dramatic illustration better than by any course of reasoning—and I never knew that fact so dramatically and beautifully illustrated as by the scene which you saw enacted here before your own eyes; I am somewhat embarrassed to know precisely how to go on with this argument, because I really do not know as to whether my brother Marbury and I are assistant prosecuting attorneys, or as to whether we are counsel representing criminals. It is very difficult to say, from the standpoint of the State, as to what the State would say with regard to it; but I know this—I know that when I used to be in this court, and I used to do the best I could to send every man to jail that ought to go to jail, that the criminal dock was occupied, not by the witnesses; not by the witnesses in the case, but that the criminal dock was occupied by the criminals, and so far as my experience goes, I never knew that the witness stand was the place where the criminals ought to go, but that the witness stand was the place where the witness ought to go. Now, here we have the spectacle in this courtroom of having the witnesses—here is Mr. Grasty and Mr. Carter and Mr. Worthington, who are the witnesses, the mouthpieces of the people of Baltimore—testifying to you, testifying to the Court, testifying to the State's Attorney, with respect to the prevalence of this pernicious and infamous game; they are the witnesses standing before the people of Baltimore. The people about whom they talk, Moan, and North, and Herlich and McCready, and all the balance of them that you saw upon the stand are the people engaged in the game which they are testifying about, and yet we find, when we come to try the case in this Court, that by a sort of presto change these gentlemen are taken away

from where they ought to be and they are put into the criminal's dock and the criminals are brought here with their flashing diamonds, representing the success of their infamous schemes, and are seen on the witness stand. I say, gentlemen, what does that mean? What does it mean? It means that the State of Maryland is being used—that's what it means, that the State of Maryland is being used for the purpose of preventing any further exposure of this crime.

Ah, gentlemen, Ah, Mr. Foreman, I speak to you as a good citizen of this community, not only as a juror, and I speak to you all as citizens of the good old State of Maryland; I speak to you as citizens of the City of Baltimore about whose fair name you have heard so much. I speak to you as men who desire to stand well with your fellow citizens, and I say to you that the public interest requires that these defendants should be decorated for the boldness, for the courage, for the skill they have displayed in unearthing in this community for the first time the most contaminating form of vice that we have ever known in our midst. Therefore, gentlemen, when we come to argue this question, and we want to know what the issue is, we must first know who the parties are, and I tell you deliberately that this thing was done through the instrumentality of the man that sits behind me here and others; this thing was done for the purpose of closing the mouths of witnesses who were talking so strongly, so truthfully about the prevalence of this game, that they actually broke it up in the City of Baltimore.

The policy man says: "Why, good God, we can't stand this; this can't go on; if you let those News people go on they will stop our carrying on this game; something has got to be done; we must teach these people that in the State of Maryland we have the power." That this band of politicians—"we—we have the power and we will get the State of Maryland to put a padlock on their mouths, by putting them behind the bars of a prison, and then they will let us alone; then we can sell our policy; then we can violate the law with impunity; then we can wrap the police around our

fingers, because if a jury in the Criminal Court of Baltimore says that this newspaper shall not carry on its holy crusade, if a jury of the citizens of Baltimore say that they are perfectly willing that this nefarious swindling scheme shall go on untouched and unarrested in the City of Baltimore, then we can sell as much as we like; we can open our doors; we need not have any kind of secrecy; because every newspaper in the town will be afraid to expose us or say anything about it."

Therefore, gentlemen of the jury, you see the momentous character of this question; the real question in this case and I desire to emphasize it with all the power at my command, the real question in this case is, shall policy playing live or shall it die in the City of Baltimore? If you say to these people, "You go to jail for exposing it," your vote means that it shall live. If you say to this man, "Hands off of the process of the criminal law; hands off, take away your tainted presence, don't masquerade as being the immaculate man of honor; don't play the fool—"if you say that, why then, gentlemen of the jury, the citizens who are fond of law and order will have new hope inspired in their breasts, and this thing will be attacked again and again; but if, by your verdict, you convict (you cannot possibly think of such a thing as bartering with your conscience for a single moment upon such a question), and these defendants go to jail, they go there as martyrs. They go there with pleasure; if by your verdict this young John Carter goes to jail, he goes there thanking you that you have by putting him in jail educated the public opinion to such a height that it will sweep all these technical barriers before it, and drown policy in a universal sea of disapprobation. Therefore, gentlemen, this is the issue that we are here to try. No technical objections; no reading of law books founded upon the old musty tomes of the law, that when a man does a certain thing the law implies with it a malicious motive. Gentlemen, this is the very reason why the constitution of this State has made you the judges of the law and of the fact. Now,

why do they do it? Why? I want to speak of some few preliminary things, because I have told you what this issue is and I am going to prove it to you in detail, and I am going to prove, in addition to that, the truth of this matter in such a way that there is not a man in this jury box that could for a moment lie down upon his pillow and sleep the sleep of the just if he said by his verdict that these people ought to be sent to jail for doing what they have done. Why, gentlemen, and the infamy of it would rise up before you as Banquo's ghost rose up before the frightened eyes of Macbeth, and when he said "Down, down! it would not down." No man who is a citizen of this State can, by any possibility, say that the result of this trial shall be that these men shall go to jail. No man can do it.

You are the judges of the law, and you are the judges of the facts. Now what does that mean? That means that when a criminal case is tried before a jury, they have the right to say as to whether, when a party is accused of a crime, he ought to go to jail for what he has done. Looking at the whole transaction, looking at the elements of the crime, you have the right to say what the facts are; you have the right to say as to whether these facts make such a crime as to justify the imprisonment which would follow as the sentence from the Court. Now, that is your power and right. Now, let me tell you the reason of that by an illustration: Some time ago there was a long casuistical discussion as to whether, if a man who, from disease or from misfortune, had been brought to starvation's door, who had a family dependent upon him, a wife and children hungering at home, crying out plaintively for bread, and he could not procure bread for them, should go out, in the desperation of his domestic affliction, and, after trying unsuccessfully to get charitable relief, passing by a baker's door, should take a loaf of bread home to be put in the mouths of his famishing and starving children, and a police officer should see him and take him to the station house and put him in jail, and he would be brought here for his trial, what would the State's

Attorney say, taking his authority from the law book? Why, the State's Attorney would say, "Why, gentlemen of the jury"—I know that he would not, but I say that he would, if he argued that case as he is arguing this, he would say: "Gentlemen, just look at Bishop on Criminal Law. A man who takes the property of another is guilty of larceny; he has no right to do it," and yet, gentlemen of the jury, isn't there a law book higher than any book bound in calf? Isn't there a law book within the breast of every honest man who has a heart that beats with the red blood of honor, and would not that law book speak in thundering tones to the State's Attorney and say: "What! In a civilized community with little children starving for lack of food, this man must go to jail because he is obeying the parental instinct to feed them!" It would be an outrage, an infamy to do it. Just so here; you say that these people have a malicious intent and a wrongful design to injure Mr. Fledderman, and when we come to ask the reason for that you say, pick up the book and see what the law book says. If you publish a libel the law presumes—presumes that these gentlemen were actuated by the malicious motive of injuring this man.

I say, gentlemen, it is not true. The jury have the right to investigate the real facts of the case. Did these gentlemen intend, by this publication and did they get this publication together—did they go to the extent of unearthing all this criminality—for the purpose of maliciously injuring this man? Now I do not intend to read much law, but let me simply amplify what my brother Marbury has said, and I read from section 211 of Bishop on Criminal Law. "Technical rules, though necessary in the criminal law, are not to be carried so far as to be detrimental to the public repose or to a sound administration of the judicial system. No theories"—now I call your special attention to this, because you are, as I say, the judges of the law, and your consciences bind you to a correct sense of what the law is as much as by a correct interpretation of the facts of this case—"no theories however fine should ever persuade a court

to pronounce against a defendant a judgment to which the conscience of mankind will refuse to respond." And there is the criminal law book which is the standard law book. Let me read that again, because it is like letters of gold which ought to be over the door of this Criminal Court room, when we have cases like this. "No theories, however fine, should ever persuade a court to pronounce against the defendant a judgment to which the conscience of mankind will refuse to respond."

And again in section 287 of the same book, Bishop on Criminal Law: "There can be no crime, large or small, without an evil mind. . In other words, punishment is the sequence of wickedness, without which it cannot be." So that you are here to find a verdict from that law. Now let me have that indictment and I will show you what the State is obliged to prove. No court would convict a man unless the conscience of mankind will respond to the conviction, and no man can have the brand of criminality put upon his brow unless you look into his heart and find that he has an evil heart and an evil conscience, and an evil mind, because it is against the common usages of the law to say that a man is a criminal when he is performing a high public service. It is against the common judgment of mankind to say that a man is a criminal when he is intending to do the people the highest service that lies in the power of a great newspaper. You cannot find a man to be a criminal, unless you can look down into his heart and into his conscience and put your finger upon the wickedness that lies there as the scum upon the pool of stagnant water; we must find it there; you must find the slime; you must find the ooze, such as you find in the mind of a criminal, before you ask the jury to use the stamp of the State of Maryland, and an awful power it is. Into your hands is put the stamp of the State of Maryland, and the language on it is the word "Criminal," and you have the right to brand that stamp on the foreheads of these people. Can you do it? Your verdict must be an honorable verdict, and unless you can bring your minds to

that point, taking this august stamp of the State of Maryland and branding these young men as criminals, your verdict must be, Not Guilty. You cannot do it. Oh, gentlemen, I only wish I was strong enough to express the real indignation that bursts from the heart of every honest man within the sound of my voice, at the attempt of the State to do it; that the attempt of the State of Maryland to try to get this jury of citizens of Baltimore city to stamp the name of criminal upon these young men; it is not the least outrageous part of these whole proceedings.

Now, what have they started out to prove? "The grand inquest of the State of Maryland for the body of the City of Baltimore, do, on their oaths, present that Charles H. Grasty, Thomas K. Worthington and John M. Carter, the younger, late of said city, on the 9th day of April, in the year of our Lord 1893, at the City of Baltimore aforesaid"—now what? You would be surprised to find, gentlemen of the jury, because this indictment has not been read to you in the way to impress upon you the force of the language that is used. Now, what do they charge these men with? "With contriving unlawfully and wickedly"—gentlemen, hear this—"wickedly and maliciously intending to injure, villify and prejudice one Henry G. Fladderman and to deprive him of his good name, fame, credit and reputation, and to bring him into great contempt, scandal, infamy and disgrace, unlawfully, wickedly and maliciously did write and publish a false, scandalous, malicious and defamatory libel in the form of a newspaper article containing divers false, scandalous, malicious and defamatory matters and things concerning the said Fladderman;" that these men not only published this article, but that they did it wickedly and maliciously, contriving to wickedly and maliciously hurt this man; now that they must prove. That is the intention with which this alleged crime was committed.

There cannot be a crime without an evil intention, a wrongful intent, as I just read to you; that being the case, all that you have to pass upon on this branch of the inquiry is as to



whether these gentlemen, when they published this article, intended wickedly and maliciously to villify this man; that that was their object, that that was their intention, because that is what the indictment says, or that they intended to do the City of Baltimore a great public service by bringing to the light of day the hordes of policy gamblers who are fattening upon the substance of the poor. Now which? Now which? Ah, gentlemen, you are beginning to see what this thing means. There is not a man in that jury box who, if he takes that indictment, as he must take it, with him to the jury room and reads the intention with which the State has charged this crime on these people, of maliciously contriving and with a wicked intent, to wickedly and maliciously defame this man, and that that was the object and intent of the publication of that whole article—I say, there is not a man in that jury box who can look any of his friends in the face after saying that that has been proven in this trial. The very gravamen of the offense. Why, gentlemen, crime amounts to nothing unless the intention is wrong. I might kill a man by shooting him through the heart, but that doesn't make me a murderer. If that man was about to take my life, or the life of my wife, or the lives of my children, my shooting him through the heart would be wholly an act of self-defense; it is not the act done that makes the crime. If a police officer strikes a man down, and that man is a murderer fleeing from justice, the blow is not an assault, because his intention was to stop a criminal from escaping. So that the publication here cannot be a libel simply because of the publication. The intention is the very soul of the crime. It is the intention which makes the man the criminal, and hangs the murderer high upon the gallows; all men ought to receive the approbation of their fellow citizens for driving the burglar from their homes and killing him if necessary to protect his home. So that it is the intention which is the soul of the crime. Ah, gentlemen, there is nothing on the side of this prosecution that has soul in it. Now, let us look at the question for a few moments. My brother, Mr.

Carter, went so far as to say—I cannot put my finger upon his language exactly in the record, but I do not think it is very important—but he went so far as to say that this publication was pandering to the passions of the community. Well, gentlemen, if by pandering to the passions of the community, you mean exposing crime which the officials cannot expose, I think that is the kind of pandering which the newspaper ought to do; I think that is the kind of pandering which a newspaper is here for. But that was only a side issue, a little bit in reply to my brother who accused us of talking buncombe, and we do not care to reply ungraciously to anything that that gentleman may say; we esteem him so highly; we have such an affection and regard for Mr. Carter as the leader of this bar, that a provocation stronger than that would not call forth a single word in reply from our side to his speech the other day.

The real question is, did these men publish this article with the intention of defaming Mr. Fledderman, or did they publish this article with the intention of exposing a great villainy? Now, in determining that question, let us look at the situation of things. My brother, Mr. Carter, stated in his speech which he made on the question of evidence that so far as the entire article in this matter was concerned, you may take it to be true, and when, therefore, we brought a cloud of witnesses to prove its truth the State objected, and the ground of their objection was that you could take it to be true, and it was not necessary to prove it, and therefore, gentlemen, we have a perfect right to assume that it is true. Now let me give you another reason if assuming that it is true, the State of Maryland is obliged, if they find this thing to be libelous, and if they desire to punish it as a crime, they are obliged to state in their indictment the whole of the article.

Because it is one thing. It is one publication. If this were a libel intended to vilify the police, it should have been stated in the indictment that that was its intention. If this newspaper intended to villify Moan or Busey, or the various

other parties whose names have been mentioned here, it is the duty of the State's officer to allege in the indictment that that was the intention, and if he did not allege that that was the intention, he confesses by the very form of the indictment that there is nothing else in it that he can charge as being libelous. So we have not only the concession of counsel when they speak on the floor that it is true, but we have also the implied concession from the very form of drafting the indictment.

That leads me to another point, and that is the point to which I should like to concentrate your best thoughts, if you will give me your attention. You have been witnesses in this Court of one of the most remarkable struggles that has perhaps ever taken place in the Criminal Court of Baltimore, remarkable by the character of the struggle that has been carried on during the progress of this trial. That struggle consisted of the waves of public opinion beating at the doors of this courtroom with the violent request that the truth of the allegations should be permitted to be proven. That struggle consisted in the waves of public opinion beating so strongly at the doors of this Court that, although the request, at the instance of the State, was refused, the spray from those active waters has diffused the atmosphere of this room and we are impregnated with the essence of the truth, although not saturated with it. The essence of the truth is here. We asked the privilege of ringing up the curtain and giving you the drama of low life in Baltimore, but this was denied, and the hand that restrained the pulling up of the curtain was the hand of the State.

Now, what does all that mean? That means this, that if the State's officers drew their indictment for the purpose of excluding that proof and succeeded in doing it (and I will not comment on the validity of that, and I shall not for a moment speak on any decision of the Court in this particular case, for the Court has decided the law, and as officers of the Court we bow in respectful obedience, and say that we shall not go one iota beyond the bounds which

have been laid down here)—I say that when the State succeeded in excluding this proof the State never thought, when they were doing it, that they were throwing a boomerang at us, the nature of which boomerang is to rebound and strike the man who threw it. They never thought that by excluding that testimony on the theory on which they drew this indictment, that they put themselves outside of the power to ask for conviction in this case. I say that because if you can find that the intention of this article was not to defame Mr. Fledderman, they have limited it to that and excluded the balance.

They have limited it by putting that in the indictment, and now they must fail for the reason that they have not proved the thing they started out to prove. I think I can pick up this publication and show you, beyond all peradventure, the intention. The idea of Mr. Fledderman putting himself up so high in this community, he such a great man, he so much better than his friend Sonny Mahon, he so much holier than his compatriot and friend on the hill, Butch Murphy, and he holier than Charles Busey and Charlie North and Tom McCready and Herlich and Davis, so much more holy than they, that The News went to work and wrote this whole article and constructed and built it up and put all these other names in it with the wicked intention of hurting him. That is the offense which the State charges. I do not want to speak more disrespectfully than I am obliged to. There is a chariot going through the dusty places of Baltimore that has big wheels and many spokes, but I never heard of Mr. Fledderman being more than one of the flies on the dusty wheel. I never heard of him being capable of raising all the dust in the politics of Baltimore, and isn't it monstrous for him to say, as the indictment says, that they published this article for the purpose of maligning and slandering him. That is not true and the paper itself shows it is not true.

Now, for example: They did publish of and concerning him an article according to the indictment following, that is

to say: "Policy is to bloom out again in full force on Monday. This declaration has been made by the backers in this city and whispered around in the sanctum sanctoriums of the initiated, bruited about in police stations and spoken of in political clubs and in the public buildings."

Now mind you, all this said about him, with the intention of defaming him.

"The political godfathers of this pernicious and degrading game have said go in, and the fiat has been issued, stamped with the approval of 'de ring.' "

Mr. Fledderman thinks he is the ring—"I am the State," because, before he can measure up to the greatness of being the whole he must embrace within himself the large politicians like Sonny Mahon and Herlich & Davis. They a mere side show, and he the great I am, the object for which the arrow of The News was poisoned for striking. You gentlemen who know Sonny Mahon and his influence in politics in this city, you gentlemen, who may have friendly feelings for him and others connected with this matter, look at the position Mr. Fledderman has put them in. He has put them up before the community as confessed criminals, who cannot open their mouths without criminating themselves, but for the purpose of saving his reputation he directs Sonny Mahon and Charlie North and Busey and Murphy and all his party to step aside and says: "Now, gentlemen, my reputation is so spotless, I am so immaculate that I bring you all before the bar of Baltimore and make you confess that you are criminals for the purpose of saving me." If it were true it would be the act of a coward to do it. I read further from this article:

"The boys are to sally forth on Monday to resume their work of home blasting, character wrecking, soul degrading——"

That is the only connection of soul that I find in this prosecution——

“——soul degrading policy writing. For two months or more the monster has been inactive, cowed by the assault made upon it by The News in the memorable exposure of January 25, which were both unexpected and effective. Now it is about to raise its ugly head again in its entirety and attempt to defy public opinion once more.”

This is conceded to be true. This soul-degrading game of policy which stretches its unclean hands into the pockets of the poor of this city was cowed by The News and had its very vitals pierced with the shafts of public criticism, tipped not with venom, but tipped with the salve of public righteousness. That is all true, these gentlemen of the State say. They say it is all true. Then the article goes on:

“Now it is about to raise its ugly head in its entirety and attempt to defy public opinion once more. No one thought at the time that policy had been struck a mortal blow, for it is like the fabled cat and has a multiplicity of lives. The News has been vigilant, however, and has maintained a watch upon the beneficiaries of the game. The News has stated all along that the game was a side show of the corrupt political ring. Policy could not exist for a day in this community without the favor of the bosses, and it is about to reopen business.”

That the State's Attorney says is true.

“And it is about to open business with their cognizance. On Monday last pursuant to a call the backers met at Arbeiter Hall on South Frederick street to take steps to revive policy. The old idea of freezing out some of the smaller fry was abandoned, simply because within the past few weeks the frozen out backers have been telling the police about the backers who were writing policy, forcing the bluecoats to make arrests, whether they liked it or not.”

Policy is revived in the City of Baltimore after it had been cowed into submission. That is the truth. That was the situation of things in this community which confronted the ed-

itors of The News, who tried to uphold the weak and nerveless hands of the State against this vice. You cannot get at a man's intentions unless you get at the surrounding circumstances, and we have to ascertain the ideas they had in publishing this article; and it is conceded by the State of Maryland here that when this article was written policy had been destroyed in the City of Baltimore, not permanently, because, like the cat, it had a multiplicity of lives, but cowed into temporary submission, and these men creeping under the shadows of darkness, under the gaslights, down to Frederick street, each coming out of his den of iniquity, with the guilt in his heart and exhibited in his face, met in secret conclave for the purpose of determining—what? As to whether the floodgates of iniquity that had been stayed by The News should again be thrown open and allow this iniquity to rush over the people of Baltimore; to determine as to whether this playing of this degrading game should again begin to wring the money from the poor; a secret conclave of policy backers, eminent politicians and gamblers meeting in secret under the shadows of night, after being cowed upon the approach of public exposure of their transactions, and as all conspirators meet, and The News knew it. The eye of The News was in the room. The ear of The News was there and heard what every man said, and the eye of The News saw who was there and saw them put up their \$82, and heard them resolve, "Now we will again begin this game of policy in the City of Baltimore, which we have temporarily stopped," and that was the situation of things and The News knew it, and that being the situation of things they published this article, and they did give you the name of everybody there, and in connection with that say that among other people who were there was Herlich of the firm of Herlich & Davis, of which ex-Sheriff H. G. Fledderman—is what? Is a partner? No.

"Of which ex-Sheriff H. G. Fledderman is said to be a silent partner."

That is to say, Herlich & Davis were there and that this



man, by reputation, was connected with them in their game. I will make him speak out of his own mouth in his own condemnation. I am coming to that. I only want to show to you that here was this great public calamity threatening the people of Baltimore and that *The News* was the avenging angel in asking the people of Baltimore to keep the vice from spreading, and in that connection they say that policy is about to begin again and tell you who was at this meeting and where they met and what money they put up, and the State of Maryland says that they did do all that with the wicked—just think of it!—with the wicked and malicious intention of injuring Fledderman. I say it is absolute nonsense. That thing was done for the purpose of adding chapter two to the holy crusade against vice and crime in this city, and it does seem to be passing strange that this trial develops the fact that there is almost red-handed this kind of vice and crime in this city, and the public authorities do not seem to be any more able to cope with it than a baby is able to cope with a giant. I say, therefore, the first proposition I make, and I ask the State's Attorney to reply to it, not by technicalities, not by mere inference of law, but to reply to it as a matter of fact, and as a matter of truth. Show to this jury that your allegation in your indictment upon which you must stand or fall is true. The allegation which has been of so great service to those other gamblers in keeping them out of the investigation, is that this whole article was published by *The News*, not with the intention of doing the public a service, not with the intention of throwing the light of investigation upon a crime, not for the purpose of staying an iniquity, but that the whole thing was done, and the whole thing was gotten up, and all the scantling of it was constructed for the miserable purpose of reaching instead of that high in the air down so low as this (raising and lowering his hand). Now let them prove that if they can. That is the first proposition we make in answer to this indictment.

We come now to the second proposition. My brother said

all along, and it seemed to me with a great deal of complacence, and it seemed to me with some display of pleasure, "Gentlemen, we will concede that Charlie North is a policy backer, and that Busey and the Murphy boys and all those are engaged in the same business, but you must prove that Mr. Fledderman is in it."

Now, gentlemen of the jury, there are some things which are more difficult to prove than others. If a man is engaged in a legitimate business and he becomes a silent partner or a secret partner or a special partner rather, we have a law in this State that he is obliged to execute an article of agreement in which he states the precise amount of money he puts in, and the articles of agreement are signed and sealed and acknowledged and put on record in Mr. Bond's office as part of the public records, and if you want to prove that kind of partnership, all you have to do is to do as they did in proving the certificate of incorporation of The News Company. You go to the public records and get a certified copy of the records. Does my brother want that kind of proof? Does my brother want us to prove that Mr. Fledderman signed and sealed an agreement and put it on record that he was in the business backing Herlich & Davis? I do not suppose he does. Members of an honest business firm will have their bill heads and letter heads and have their signs up before the door, and if you want to prove that they are in partnership all you have to do is to inquire and you will find all these evidences of it. But when you come and allege a partnership which consists of a criminal conspiracy, do you not think it hides its head and goes in the dark, and do you not know that the facts are so hidden that it is only the man who has intimate connections with the parties themselves who can put his finger on it, and it is only by getting a man in their confidence to turn traitor that you can prove a partnership of this character? When you are tracking up a criminal to convict him of a criminal conspiracy, you must first get the assistance of some one intimate with him. How do you prove his guilt? You do not prove it by offering proof

that five men got in a room and talked over the conspiracy, but you first prove the result and you prove that those parties were seen together and prove that their relations are such that the thing cannot be explained in any other way, and after you get all the circumstances of incrimination, you put the burden of explanation upon the man, who, if he is honest, if he is not in the business, he can open his mouth and tell you he is innocent without any difficulty.

I never knew a case of crime which was detected and punished on circumstantial evidence wherein the detection and punishment did not arise from some blunder of the criminal himself. If you will examine the remarkable trials in history you will find that the criminal makes his plans in a most skillful manner, he will plan how he will enter the sleeping apartments beforehand for the killing of a victim, but in a moment of forgetfulness or excitement he leaves a part of his apparel behind or he leaves his dagger, and in this way he is identified. He leaves some clue to the participation in that crime by which he convicts himself. You do not need other proof. He convicts himself, and I say here that beyond the shadow of a doubt Mr. Fledderman has convicted himself. He stands before you a self-convicted partner in this nefarious scheme just as absolutely, just as truthfully and as powerfully as if he had gone on the stand and in answer to our interrogatories had said: "Gentlemen, I cannot open my mouth, because if I do I will criminate myself."

Now, gentlemen of the jury, I want to rely upon that, and I want you to pass upon the cowardly act of his sitting here in this court after driving all his political friends here, and after making them practically say they are criminals, and that he is the man of faultless reputation, and that he is not connected with these people, and when the truth of that is in issue he is afraid, and I use the word advisedly, afraid to swear to it. I say he has been challenged to do it; challenged to go on this stand and swear that he is not the partner of these men whom we have shown to you to be standing behind him.

As my brother Marbury so well said, if you associate with thieves, can you blame the community for thinking you are connected with them? Has not this man Herlich been notoriously a policy backer for years and years and years? Has he not gone numberless times to Hamilton and said: "Go bail for some of my policy writers?" Have not the witnesses of the State said that it is a matter of common knowledge that he is a policy backer? Are not the connections between Fledderman and Davis, by virtue of the official relations which they had, and by virtue of the facts which surrounded these men all incriminating circumstances of the kind by which you convict a criminal on circumstantial evidence? Can we say that he did not feel the force of that? Didn't we challenge him? I am very glad we have the stenographer's notes here. It occurs in the argument I made yesterday before the Court, and it was done for the purpose, as you will see from the language, as I read it, of putting this man on his feet if he had a drop of manly blood in his heart. That is what it was done for. I was arguing about the system of evidence. We showed that Fledderman was a part of a system by which the police, some of the police; the politicians, some of them, and the gamblers were united together by the cords of private interest, and that he was one of that system, and that is what we tried to get the Court to permit. And then this is what I said:

"It is admissible in evidence, certainly as against Herlich and Davis, and I think we will be able to show certainly as against Mr. Fledderman——"

And I think we will be able to follow up every word that I am about to state to you as if they were Fledderman's words, because they give you the key to this whole business, and it simply needs that they shall sink into your mind and heart and you will undoubtedly at once reject the suggestion as infamous that these gentlemen shall go to jail for saying of this man that he is a partner in the business when he is publicly charged with being a partner, and when he is told

to go on the stand and say whether he is or not. Let us follow this language:

“It is admissible in evidence, certainly against Herlich and Davis, and I think we will be able to show certainly as against Mr. Fledderman, by reason of his constant contact and association with these people which cannot be explained, unless he goes upon the stand to explain it——”

This is said in his hearing. He was sitting here when this was said right at him, because there is nothing we are afraid to say when there is anything connected with this prosecution that needs be said, not because of bravado, but as I say, no matter how weak the arm of mortal man may be, it is made strong when it has the truth behind it. To requote further:

“Which cannot be explained unless he goes upon the stand to explain it, which we are perfectly willing for him to do; we would like to have the privilege of cross-examination of Mr. Fledderman as to his connection with the politics of the Tenth ward in the shape of various kinds of protection in connection with the police.”

A challenge like that to a man of honor! A challenge like that to a man of honor who is not interested at all in this prosecution would be answered outside of the courtroom by a blow, but in the courtroom would be answered by the indignant rejoinder, “Of course I will go on the stand;” but we have the absurd spectacle of this man coming before you and asking you under your oaths to send these men to jail for saying that he is a partner of Herlich & Davis, and he says that that is an infamous lie, and yet when we challenge him to go on the stand and say that it is a lie, and when we want him to go on the stand in order to cross-examine him and show to this jury who Mr. Fledderman is, what his reputation is, how he is connected with the protection by the police of crime in his own ward, what does he do? Language is not strong enough to express the reprobation with which to denounce a man so white-livered as to sit still under an invective

like that. It is a confession that he is that particular thing which he refuses to swear he is not.

I say, therefore, gentlemen of the jury, is it not idle, is it not folly to pursue this investigation further, and let me close by calling to your attention first that you are the judges of the law and you are the judges of the fact. Secondly, that you cannot convict these people unless you find that in addition to the act of publication their intention was wicked and malicious and venomous in writing this article, and that that wicked and malicious intention was to defame this particular man, and you cannot find that under your oaths or on your conscience, and I say, thirdly, that this man is everything The News has said of him, and he confesses it to you by sitting here, after dragging in his friends and putting them in the pillory and making them say practically they were criminals, and when given an opportunity, which he says he has been seeking so long, to vindicate his reputation, and we say, Mr. Fledderman, go on the stand, we want to examine you; you go there and take the Holy Evangel of Almighty God in your right hand and swear so help me God I am not the backer of Herlich & Davis, and he quails and sits still and does not rise to his feet. If The News had said anything that could be regarded as libelous there is not a jury that sits under the American flag that would possibly find a verdict in favor of a coward so white-livered as that.

MR. KERR, FOR THE STATE.

*Mr. Kerr.* With the permission of the Court, gentlemen of the jury, although I would have preferred to have had a little more rest, I bow to the judgment of the Court as to the importance of this case being closed today. I think that probably you may be at a loss to know whether this case is an important one or whether it is a trivial one. My learned brothers on the other side, and particularly my learned brother Mr. Gans, treated this case the day before yesterday, on the first day of the trial, when he was discussing the question of the admissibility of the learned gentlemen whom I had asked

the Court to permit me, in accordance with the usual custom of this Court from time immemorial to have the assistance of, called it a mere peace case, a trivial and unimportant affair. It is now magnified by these gentlemen themselves, Mr. Marbury and Mr. Gans, as a case of the utmost and most vital importance to this community. That was the view I took of it, gentlemen, in the first instance, that it is a case that involves an important issue, and one which justified me, in accordance with the customs of this bar of the Criminal Court, to ask the allowance of the assistance of the learned gentlemen who were the private counsel of Mr. Fledderman.

Therefore, gentlemen, I appear before you in my capacity, as State's officer, to argue what I conceive to be a most vital issue put before you, and which you are called upon under the solemnity of your oath to consider. That issue is not, gentlemen, as the learned counsel for the defense would have it, whether policy is rampant in the City of Baltimore. It is not whether the police department have failed to do their duty in the case. It is not whether the police department of the City of Baltimore have connived at the playing of policy by any action of theirs or by non-action of theirs, as has been charged by the learned gentlemen representing the newspaper, or have failed to do their duty in the suppression of this acknowledged evil.

Now, right at the outset, I want to repeat what I have said several times during this trial. Nobody denounces or abhors the practice of policy-playing more than I do. Like my brother Marbury, I am a man of the world. I am not afraid to confess that I do not take the view about a game of draw poker for private amusement that some sentimentalists would take, and in which my learned brother has practically told you, or intimated, that he quite agreed with me.

*Mr. Marbury.* It depends upon the limit.

*Mr. Kerr.* I agree with my brother Marbury further, and my brother Gans also, that this evil, policy playing, is one which deserves the denunciation of the public press, because it is, as they have justly said, a form of gambling which takes



away the pennies from the pockets of the poor, and which is inducing labor people, ignorant people, to lose the wages which they earn, instead of using the money for making provision for the daily support of their families. Instead of doing this, they put it into this vice, or call it by any other name you please. It is an acknowledged evil, and one which the police authorities of Maryland always recognize as such, and which the Legislature of Maryland has practically denounced by prescribing the punishment for it.

Therefore, I repeat right here now what I said in the beginning of this trial when I was called upon to do so or felt myself called upon to do so, that if there were any evidence in this case, if there could be the slightest possibility of truth in this case that H. G. Fledderman had been directly or indirectly connected with the policy business as alleged in the charge made against him in this alleged criminal libel, the article in *The News*, I would be the first man to get up here and stop this proceeding. If I believed it I would say, "Gentlemen of the jury, the defense has produced evidence to show Mr. Fledderman's connection with this policy business and this prosecution must stop," but, gentlemen, from the beginning to the end of this trial there has not been one particle of evidence produced on the part of the defense to prove the allegation that Henry G. Fledderman was directly or indirectly interested with Herlich & Davis in the policy business. The whole trial on the part of the defense has proceeded upon a theory that because *The Evening News*, *The Baltimore Daily News*, I believe it is called, although it is published in the evening—I have forgotten the exact title—that because they had justly denounced what every honorable and respectable man in the community denounces, the policy playing business, that therefore they were entitled to put in anybody that they chose and allege that he was interested in that business.

Now, gentlemen, you on your oaths are here to try the inquiry to which the Court has narrowed you down. The inquiry not as to whether policy business is rampant in the

City of Baltimore, not as to whether it is an evil, not as to whether any public official or politician has been directly or indirectly interested in it or failed to do his duty in its suppression, but you are narrowed down to the inquiry as to whether this article in the paper has reflected on Henry G. Fledderman in a manner that constitutes a criminal libel.

Now that is the ruling of the Court, that is the inquiry that you are to make upon your oaths.

Now what is the charge against Mr. Fledderman, not simply that Mr. Fledderman was a partner of Herlich & Davis, but the charge is, and it has been attempted to be proved here, that Herlich & Davis were conspicuous backers of the policy business, and that Mr. Fledderman was backing them or associated with them. The charge in the article is that there was a meeting held at which the backers of policy, the prominent backers of policy of the City of Baltimore, met together on a certain day after the policy, as they claimed and alleged, had been broken up by the articles in *The News*, that they had gotten frightened, that they had determined to stop the business, and then, having supposed that public sentiment had been quieted, that they were about to revive that business, and they had a meeting for the purpose of determining upon what terms and under what circumstances they would do so. Then they go on to relate in speaking of that meeting that among the men there representing these policy backers—I will not name them all; they have already been read to you several times—they name the firm of Herlich & Davis, of which ex-Sheriff Henry G. Fledderman is said to be a silent partner.

Now, gentlemen, the inquiry for you to make is, is that libel? Is it bringing Henry G. Fledderman into contempt in the eyes of the community? Is it bringing his character before this community so as to constitute a criminal libel? I will say a word to you after awhile about his rights as a citizen.

The Court of Appeals in our own State, deciding the case

that you have already heard referred to of Richardson, in 66 Md., used this language.

“All authorities agree that any written words are libelous which impute to a man fraud, dishonesty, immorality, vice, crime or dishonorable conduct, or that he be suspected of such conduct, or which suggests that he is suffering from an infectious disease or which had a tendency to injure him in his office, profession, calling or trade, or which holds him to contempt, hatred, scorn or ridicule.”

Now, gentlemen, Mr. Fledderman stands before you, notwithstanding the aspersions which come from the learned gentlemen who represent the defense, the counsel for the defense in this trial, in this case, without a blot upon his character. They have not proved by any witness, as they have not dared to ask any witness whom they brought upon the stand the question as to whether he knew whether Mr. Fledderman was connected with Herlich & Davis. They have not dared to ask any one of the witnesses that question, and I have just as much right to assume that the reason they did not ask him was because they knew that the witness would answer that he never knew anything that would justify the thought that Mr. Fledderman had any such connection with the policy business—I have just as much right to draw that inference as the learned counsel for the defense had to say, as they have attempted to infer, that because the State did not choose to enter into an agreement with them to defend their witnesses by the State’s Attorney saying that he would enter a *nolle prosequi* if they incriminated themselves, which is the most extraordinary proposition I have ever heard, and I will come to it directly—that these witnesses might have proven what they had failed to prove in this case.

My learned brothers also have talked about Mr. Fledderman dragging here upon the witness stand his own political friends. Why, gentlemen, there is not one word of truth in that, and I speak it plainly. The records of this Court will show that every witness put upon the stand by the defense was summoned by the defense, and they relied upon the class of witnesses they brought here and whom they have pleased to denounce—to practically say that their own witnesses

were a set of thieves and scoundrels engaged in this policy business and utterly unworthy of belief. I have not the acquaintance with them that my brother Marbury must have if he adduced that inference from their presence. But, gentlemen, there is no evidence in the case to show that Mr. Fledderman ever knew any of these men, and yet they call upon you to say, because Mr. Fledderman is a politician, because they say that he is a boss in the Tenth ward, they want you to try this case upon the issues of the politics of the Tenth ward and not upon the issue made by this learned Court and presented to you upon the solemnity of your oaths to determine whether Fledderman was a partner of Herlich & Davis or not.

I said that this was a most extraordinary proposition. You have all heard of witnesses turning State's evidence, as it is commonly called. In other words, where one of several men is charged with a crime, it is a common thing, it is notorious, if the State's Attorney can get from one of them the testimony which is necessary, without which he cannot convict the gang, one or more of them, it is a common thing for the State's Attorney, and I have done it over and over again, when this witness comes up and confesses the truth, to put him on the stand. But then by the common practice of the Criminal Courts of our country that witness is guaranteed protection from any prosecution of himself. That is not the case of the witnesses for the defense brought here, whom I do not know.

*Mr. Marbury.* We introduced them to you.

*Mr. Kerr.* You introduced them, yes; a speaking acquaintance with policy backers as was presented in the language of my learned brother, a speaking acquaintance with the policy backers of the City of Baltimore.

If my brother wants to aid this progressive journal in the work which he says they are performing, let him go further and procure for me the evidence which will convict any one of them, and I will send the witnesses before the Grand Jury at any time with pleasure, for I am as much in earnest in

regard to this business as The News can be, or as my brother can be, either one of them, and whenever a proper case is presented to me, I will send it to the Grand Jury. But I remember the witnesses from The News office were sent to the Grand Jury a little while after the publication of the article of January 25th, and they failed to give evidence upon which, I believe, a single indictment could be framed.

*Mr. Marbury.* Plenty of them you did not summon. The only man ever convicted of policy backing in this city was the result of The News' exposure.

*Mr. Kerr.* But, gentlemen, that is neither here nor there. I make no issue with the proprietors of the newspaper or its editors as to their work in this regard, but I do state that the Grand Jury of the City of Baltimore, the grand inquest for the State of Maryland, in and for the body and city of Baltimore, have found the presentment upon which this indictment is framed, and which you are called upon to try, and which you alone are called upon to try, and that is the charge against Mr. Fledderman, that he is a criminal, that he is in daily violation of the law of this State, and that he is a disreputable man, in other words; that he is not worthy of employment in any respectable position, that the Brush Electric Light Company, which he represents, should discharge him; if this allegation is true that he is to be deprived of the respect and confidence of the people who have honored him in the past with several important offices, who put him in the position of High Sheriff of the City of Baltimore, one of the highest offices in the gift of the people of the State and so recognized.

Tell me that he is not to have his rights considered, his family protected. Tell me that you are not called upon to treat him in the absence of any testimony showing the truth of the charge that has been made against him. Tell me that you are not to treat him just as you would treat any other man in the city, simply because he has been a politician, that he may have had some influence in the Tenth Ward—why, it is monstrous, setting at defiance all rules of law; it is set-

ting at defiance the liberty of our citizens; it is setting at defiance the justice which surrounds and is supposed to reside in every criminal tribunal. Now, gentlemen, I want to call your attention. I am not going to read much law, because I think you have heard enough today, and you know what criminal libel is. My brothers say that because they were engaged in this good work of generally denouncing the evil of lottery policy, that therefore any inadvertent allusion to any individual as being connected with that policy business, you are to treat lightly; that you are not to hold them to a strict accountability for that; that there was no malice; that there was no evil intent; that there was no intent shown to injure Mr. Fledderman in the slightest degree and that, therefore, you are to treat these people—in other words that they are to be heroes and they are to be applauded by your verdict because they are doing what the general public think is a proper thing for them to do.

What does the law say? Now, mind you, you are brought down to the inquiry as to Fledderman's connection with this policy business which they have charged. What does the law say about proof? Referring to libel, I read from Greenleaf:

"It is not necessary in the opening of the case on the part of the government to adduce any particular evidence to this point, where the publication as charged is itself defamatory."

You cannot be more defamatory than charging a man with being engaged in this nefarious business. Do not my brothers themselves by their own arguments in reference to the character of this business give you the strongest evidence of their own denunciation of the people who are engaged in it, who were their own witnesses—do they not give you the strongest evidence of the defamatory character of the charge against any reputable citizen of being connected with that business?

"For in such cases the law infers malice, unless something is drawn from the circumstances attending it to rebut that inference. But where the intent is equivocal or the act complained of is not plainly and of itself defamatory, some substantive evidence of malice should be offered. Such evidence is also necessary on the part of the prose-

cution, where the defense set up to the charge of a libelous publication is, that it was privileged—”

There is no such defense here.

“If the communication was of a class absolutely privileged, proof of actual malice is inadmissible, as it constitutes no answer or bar to the privilege. Such is the case of matter necessarily published in the due discharge of public duty. But where the publication is only *prima facie* privileged, as in the case of a character given of a servant or of advice confidentially given, or the like, the defense or privilege may be rebutted by proof of actual malice. Thus, it may be shown, that the same communication was voluntarily made by the defendant on other occasions, when it was not called for.”

Then the writer goes on to show what is necessary:

“Though the indictment for a libel in writing or print should charge the defendant with having composed, written, printed and published it, yet it is not necessary to prove all these; for it is not perfectly clear that it is legally criminal to compose and write libelous matter if it be not published and it is well settled that the charge will be supported by proof of the publication alone, this being of the essence of the offense. Publication consists in communicating the defamatory matter to the mind of another, whether it be privately to the party injured alone, with intent to provoke him to a breach of the peace, or to others with intent to injure the individual in question, or to perpetrate more extensive mischief. And, generally speaking, all persons who knowingly participate in the act of publication are equally liable to prosecution for this offense.

“It will be sufficient, therefore, in proof of publication, to show that the defendant wrote the libel which is found in another’s possession, until this fact is otherwise accounted for; and if a letter, containing a libel, having a postmark upon it and the seal be broken, this is *prima facie* evidence of its publication. If the libel be in a newspaper, the act of printing it, if not otherwise explained by circumstances; delivering a copy to the proper officer at the stamp office, and payment to the stamp officer for the duties on the advertisements in the same paper, have each been sufficient evidence of publication. Proof that the printed libel was sold in the shop of the defendant, though it were without his actual knowledge, the sale being by a servant, in his absence, is sufficient evidence of publication by the master; unless he can rebut it by proof that the sale was not in the ordinary course of the servant’s employment, and that the book was clandestinely brought into the shop and sold, or that the sale was contrary to his express orders.”

Now, gentlemen, it is not necessary to bother you with more law. Here we have proven all that the law requires.

We have proved that these three traversers here occupy certain respective positions; that one was the general man-



ager, the other was the managing editor, and that the other was the city editor; they were respectively in these positions on that paper; that they were presumed to know, that they were presumed to be responsible for the publication of all articles in that paper. We have proved the publication of the paper; we have proved the circulation of the paper; we have proved that paper was purchased at the office of the newspaper company, and we have produced in evidence a paper containing the article itself, which is embraced in the indictment. Now, therefore, gentlemen, we have done all that the law requires us to do. The malice, the evil intent is presumed by law, as we have shown you.

The publication we have shown you was one that was calculated—unless it can be proven to be true—was calculated to do injury to a man who had all the rights of citizenship, a man who had lived in this community all his life, I believe; at all events, for years; that he was, so far as any evidence in this case was concerned, and so far as the public know, a man whose character was unblemished, and he has been so abused by that paper in that manner, which involves the charge of criminal libel. Now, gentlemen, it is your duty upon that evidence to inquire whether Henry G. Fledderman, upon any evidence in this case, has been shown to have been connected with this policy business, as charged in the indictment, and if you cannot bring your minds to believe that, for the burden of proof is upon the defense, and if the defense have not conclusively proven that Fledderman was interested or engaged directly or indirectly in that policy business, then you cannot escape from your responsibility and that is to bring in a verdict of guilty, no matter what the consequences may be.

My brothers on the other side harp upon the outrage of bringing these gentlemen into court for a misdemeanor which might subject them to imprisonment for crime; that you have nothing in the world to do with. It is a matter for his Honor, the Judge, when he comes to sentence them, if you should find them guilty. It is a matter that you have nothing on earth

to do with or consider when you are determining the guilt or innocence of the parties.

Now, gentlemen, my brothers have said, "Why did not Mr. Fledderman go on the stand?" I have just as much right to tell you that Mr. Fledderman would have gone on the stand, if it had been deemed proper for him to do so. He was ready at any moment to go on the stand and denounce as false and malicious the article in question. But when we found that the learned counsel for the defense had no evidence to show the connection of Henry G. Fledderman with Herlich and Davis but the fact that Fledderman had gone to Adler's salon almost every evening, as a hundred other people had done; that he had met there occasionally, not night after night, for there was no such evidence of that kind, but that he had met there, occasionally, Herlich and Davis at different times, there was no necessity for Mr. Fledderman to go upon the stand to be cross-examined by the venom which was exhibited against him personally, as a politician, and to be goaded by the venom which the learned counsel have exhibited in their denunciation of him throughout all their argument. You have no right to draw any unworthy inference from the fact that he was advised not to go on the stand.

There was nothing that he could disprove. He was not called upon to say one word. When we show the publication of the paper; when we show the men who were responsible for the publication of that libel, our part of the case was completed, there was nothing further to be done. Then the burden of proof was upon the defense to prove the truth of their charges as against Mr. Fledderman, and there was nothing for Mr. Fledderman to prove by going on the stand. I was about to refer you, and my brother Carter kindly handed me the book, to another part of the case which I read awhile ago, in which the late Judge Irving, Judge of the Court of Appeals, rendered a decision; it is the case of *Richardson v. The State* in a case of criminal libel like this, occasioned by the publication in a newspaper published at Hoodberry or Mt. Washington or somewhere out there, where he undertook

to make false charges against a Judge, now a Judge of the Court of Appeals, then an Associate Judge of the Court in Baltimore County, the Circuit Court of that district, or that circuit; and Judge Irving, in giving his opinion in the case, a part of which I read you awhile ago for another purpose, said: "Finding the indictment sufficient, we turn to the ruling on evidence, because of which this appeal was taken, and we find that the Court ruled rightly."

The evidence offered was, avowedly, only to show that the defendant had been led into an honest mistake of facts and thereby was misled as to the publication set out in the indictment. Nothing short of evidence tending to show the truth of the charge made can be admissible under our statute, allowing the truth to be given in evidence in justification under the general issue. An evil intent is a conclusive inference and presumption of law from the publication of the libelous matter without excuse.

The evidence offered was, avowedly, to prove the truth of the article; the mere fact that they had been led into a mistake amounted to nothing; it was not an excuse. They must have some excuse positive, absolute, reasonable, and they must show the truth of the actual facts alleged, and you cannot escape it. It is that or nothing. The parties indicted are either guilty of criminal libel or they are not guilty, and, according to the decisions of the Court of Appeals, which is the standing law in this State, unless they can prove the truth they are guilty of libel in publishing the fact the alleged article referred to.

Therefore, gentlemen of the jury, you are to dismiss from your consideration any outside influence that has been invoked here by the learned counsel for the defense; when he talked about the wave of public opinion dashing upon that door, attempting to get in here to influence your decision upon this case, he was talking, and I speak advisedly, with what he objected to having been accused of talking in this case, absolute buncombe and nothing else. It is the sheerest nonsense to talk about a jury being influenced; a jury of

twelve intelligent men in the City of Baltimore, called upon to decide the precise question as to the guilt or innocence of any individual charged with a particular offense, and when you are confined by your office to the especial inquiry indicated to talk about a wave of public opinion dashing at that door, it is the veriest nonsense that could be spoken before an intelligent jury; it is an effort to distract your minds; to make you, as I said before, think that because this paper was professedly engaged in the denunciation of the evil of policy-playing and policy-writing, that therefore you are to overlook every accusation that it could make against any innocent man in that connection. That is the case, and nothing else.

They talk of Mr. Fledderman convicting himself by his silence; it is unworthy of counsel to draw any such inference. I might just as well argue, if I were permitted to do so, that because these gentlemen themselves did not get up and tell what evidence they have of Mr. Fledderman's connection with policy playing, that their silence convicts them. The law prohibits me from drawing any inference whatever from the silence of parties charged with an offense by their not going on the stand to testify, but I wish to say I might just as well argue that you might draw an inference, which I would scorn to do, or to have you believe that you are entitled to draw any inference unworthy and discreditable to Mr. Fledderman because of the advice of his counsel he did not go on the stand.

Now, gentlemen, there are a good many other things here that I have noticed that I might refer to.

My brother Marbury said something about the charge made in the opening argument of my colleague, Mr. Campbell, for the State, that this paper had recklessly published this article. Well, now, was it not reckless? What could be more reckless on the part of those gentlemen representing The News to publish that article, making charges of this character when they had not the proof to sustain it and to bring into this court? They talk about Mr. Fledderman coming

to them and explaining and apologizing and asking them to make an explanation. What do they do? What could they have done when they found out, as they must have found out, that they had no evidence toward the trial of this case? They must have found out that they hadn't a particle of evidence sustaining the charge, and I know they have been engaged in working it up, trying to get evidence for weeks; when they have signally failed to prove or to find any evidence proving Mr. Fledderman's connection with the firm of Herlich & Davis, why were they not as much called upon frankly and manfully and in good faith to publish to the world the fact that they had been mistaken in regard to Mr. Fledderman and that they had no evidence to prove it?

I will guarantee that Mr. Fledderman would have been the first man to have come and asked me to have entered a *nolle prosequi* in the case upon that statement, upon that frank and manly statement to the contrary; but, no, they come here and through their counsel reiterate the charge boldly and defiantly, saying: "We make no apology; we ask nothing at your hands; we demand this case shall be tried upon technical grounds; we demand our rights; we demand that the State's Attorney, at twenty minutes to 3 o'clock, shall go on and try the case." I do not complain of that now; I have seen my brother Marbury; but I use it for the sake of the argument; and I say, were they not called upon by every sense of honor, if they had found that they had failed to prove their case, no matter what they might personally have thought of Mr. Fledderman, to have said: "We cannot prove it; we are very sorry we published it; we have not the evidence to prove it." Were they not called upon to do that as much as Mr. Fledderman was called upon after two days' publications of that libel against him to go down to their office on his knees and beg them upon his mere assertion to cease, which, from their denunciation of him here today through their counsel, it is hardly to be supposed that they would have paid the slightest attention to, upon his mere assertion that he was innocent.

Now, put the case to yourselves, gentlemen of the jury. Any man on this jury might be put in the same position, if you were to allow the principle underlying this defense to be accepted. You, Mr. Foreman, or you, sir, the last man on the jury, or any of you, if you had been in the habit of going into a beer saloon, and I do not know whether you do it or not, but if you had been in the habit of seeing men like Herlich and Davis, who had the general reputation of being policy backers or policy players, you might, with just as much reason as this paper had in charging Fledderman, if you had happened to know these men, if you had happened to take a glass of beer with them, if you had happened to know the men personally, without knowing anything about their business or their associations, or even if you did know of their general reputation, and you had known them probably from boyhood, and you had taken accidentally a glass of beer with them, I say, upon this same theory you might be charged with being policy backers, just as Mr. Fledderman is.

No, gentlemen, it is a matter of principle; it is not only a matter of law, but it is a matter of individual right and principle. It is a matter in which the liberty of every citizen is involved. It is a question, not merely whether in this individual case Mr. Fledderman may or may not suffer the consequences of an aspersion of his character, which has not been proven, but it is a question which the law has determined by authorizing indictment for criminal libel, that you shall not provoke a man, and citizen, to take the law in his own hands and break the peace of the community, but that you will hold them personally responsible before a court of justice for the effect and force of their malicious assertions through a public newspaper. Now, gentlemen of the jury, a word or two more. It is, therefore, gentlemen of the jury, not a question for you to consider in the light put to you in the eloquent language of my brother Gans, of three gentlemen against whom I have nothing in the world to say; there is only one of them that I know, and that is the one who sits before me, Mr. Carter, and whose father I have had the acquaintance of for many

years; a more honorable man does not live on the face of the earth, in my judgment; but I say that is not a question for you to consider.

Another charge. We saw the witnesses who came one after the other on the stand, and because they chose to exercise their privilege, a privilege guaranteed, as the learned Judge of this court said to them, by the Constitution of the State of Maryland and by the Constitution of the United States itself, of saying nothing in regard to their connection with policy playing or policy business, they are denounced by the defense. But it is a question for you to consider in the light of the individual liberty of your fellow-citizen, in the light of the claim which Mr. Fledderman has to your redress of his grievances by a verdict against these defendants of guilty.

Now, gentlemen, in that light I hope you will consider this case. I have no feeling in it; I never had any personal feeling in any case I ever tried in this court in my life. I have sought to do my duty, and during all this talk that was indulged in here about the impropriety of bringing in the private counsel of Mr. Fledderman to my assistance, I was as conscientious in asking the Court as I ever was in anything in my life, to allow me the assistance of these gentlemen, which the Court has done, because I believed from their familiarity with the case, their familiarity from having investigated the matter, in view of a civil trial which they were about to conduct, involving the same question, that they would be of infinite service to me; but I had no idea of doing anything else, and I never in my life have done anything in this court but what I deemed my duty. I stand here as the State's Attorney in this case, as in all others, prepared to do my duty, which I have endeavored to do, however feebly it may have been.

I ask you then, gentlemen, to weigh the evidence in this case and to weigh and consider what the law requires you to do. Then say upon your oath what is the proper verdict to be rendered. There is only one verdict, gentlemen, an alternative verdict, that can be given; there is but one count



in the indictment and you can say either guilty or not guilty, as to each of the traversers. I thank you, gentlemen, for your interest and attention.

#### THE VERDICT.

About 4:15 o'clock the jury retired. About 5:30 o'clock they notified the bailiffs that they had agreed upon a verdict.

The JUDGE and the attorneys were sent for, and at 6:50 the *Jury* returned a verdict of *Not Guilty* in the cases of all three defendants.

# THE TRIAL OF CAPTAIN JOHN QUELCH AND OTHERS FOR PIRACY, BOS- TON, MASSACHUSETTS, 1704.

## THE NARRATIVE.

The Pirate was the enemy of mankind, and was subject to capture wherever found and the Courts of every Nation and State had jurisdiction to try, convict and punish him. Though Captain Quelch and his crew did their work in the Southern Seas, it was a New England ship which captured them and to Boston they were brought for trial. The whole proceedings were very like those on the trials of Major Bonnet and his men in South Carolina fourteen years later (see 4 Am. St. Tr. 652); they were just as brief and to the point as were the trials at Charleston.

## THE TRIAL.<sup>1</sup>

*In the Court of Admiralty, Boston, Massachusetts, June, 1704.*

HON. JOSEPH DUDLEY,<sup>2</sup> *President.*<sup>3</sup>

The Court being met and opened the following articles of Piracy, Robbery and Murder were exhibited against Captain John Quelch and others as his accomplices.

<sup>1</sup> \* Howell's State Trials.

<sup>2</sup> DUDLEY, JOSEPH. (1647-1720.) Born Roxbury, Mass. One of the Commissioners for the United Colonies 1677-1681. Colonial Governor of Massachusetts 1686-1687; 1702-1716. Colonial Governor of New Hampshire 1716-1728. Graduated Harvard 1665. Freeman 1672. Deputy 1673-1675. Was sent to England to renew colonial charter for Massachusetts; was unsuccessful, and on return favored submission to the king, and was dropped as assistant by the General Court in 1684. Appointed President of New England by James II. in 1685. Chief Justice Supreme Court 1687. Arrested as friend of Andros and sent to England in 1689. Returned as Chief Justice of New York. In 1693 went again to England and became Deputy Governor of Isle of Wight and member of House of Commons. Returned to Roxbury, Mass., in 1715 and remained there until his death.

<sup>3</sup> The trial was not before a jury but before a Commission appointed by the Government. The following besides the President com-

You stand here accused of piracy, robbery and murder.

*Imprimis.* That notwithstanding a brigantine Charles was fitted out by several worthy merchants of Boston, good and loyal subjects of Her Majesty (against the French and Spanish Kings, their vessels, subjects and allies, the declared enemies of her most sacred Majesty, Queen Anne) with Captain Plowman, the said Plowman falling sick and dying, you Captain Quelch with divers others neglecting his orders and those of his owners, did not return, refused to set on shore Matthew Pimer and John Clifford, two of your company who (dreading your piratical intention) desired the same, but bore to sea to the coast of Brazil for murder and piracy as follows:

Article 1. You took near Cape Augustine, on the high seas, a fishing vessel belonging to subjects of the King of Portugal, her Majesty's good ally, and took from it fish and salt.

Article 2. You seized near Cape St. Augustine another Portuguese boat and took from it sugar and molasses.

Article 3. Another, the same, and took from it molasses, rice and farine.

Article 4. Another, the same, near Mora, and took from it earthenware, rum and linen cloth.

Article 5. Another, the same, and took from it pieces of cloth and silk.

Article 6. Another, the same, and took from it Portuguese coined money, rice, farine and a negro boy valued at twenty pounds.

Article 7. Another, the same, and took from it Brazil sugar, Portuguese money, gold and silver.

Article 8. Another, the same, and took from it gold dust and gold coin.

Article 9. Another, the same, and took from it beef, guns, small arms, shot, powder, a new mainsail, a negro boy valued at forty pounds and Spanish money.

With *Quelch* were arraigned Matthew Pimer, John Clifford and James Parrott, and they all pleaded *not guilty*.

It was ordered that Matthew Pimer, John Clifford and posed it: Thomas Povey, Esq., Lieutenant-Governor of the Province of the Massachusetts Bay; John Usher, Esq., Lieutenant-Governor of the Province of New Hampshire; Nathaniel Byfield, Esq., Judge of the Vice-Admiralty for the Provinces aforesaid; Samuel Sewall, Esq., first Judge of the Province of the Massachusetts Bay aforesaid and one of the Council; Isaac Addington, Esq., Secretary and one of the Council; Jahlael Brenton, Esq., Collector, etc., of Her Majesty's Customs, etc., in New England; Elisha Hutchinson, John Phillips, John Foster, John Wally, Joseph Lynde, John Thatcher, Eliakin Hutchinson, Penn Townsend, Edward Brumfield, Samuel Legg, Isaac Winslow, Samuel Appleton, Esqrs., members of Her Majesty's Council in the Province of the Massachusetts Bay.

James Parrott, be received into the Queen's mercy, and be declared witnesses in behalf of the Queen, against John Quelch and company, for their several piracies, robberies, and murder.

The *Prisoner* wished to know whether he might not have counsel allowed him, upon any matter of law that might happen upon his trial.

THE COURT. The Articles upon which you are arraigned are plain matters of fact; however, that you may have no reason to complain of hardship, Mr. James Meinzie, attorney at law, may assist you, and offer any matter of law in your behalf upon your trial, and it is ordered that the prisoner at the bar have a copy of the articles exhibited against him, and that he prepare for trial on Monday next.

*June 19.*

The Court being opened and Captain Quelch set at the bar, it was ordered that his irons be taken off during the trial.

*Paul Dudley*,<sup>4</sup> Attorney General, and *Thomas Newton*,<sup>5</sup> Queen's Counsel, for the Government; *James Meinzie*<sup>6</sup> for the prisoner.

<sup>4</sup> DUDLEY, PAUL. (1675-1751). Born Roxbury, Mass. Son of Gov. Joseph Dudley. Graduated Harvard 1690. Entered Temple, London, and returned to Massachusetts 1702 as Attorney General of the Province. Represented Roxbury in the General Court for several years. Naturalist, and Fellow of the Royal Society of London, and contributed to its transactions. Died in Roxbury.

<sup>5</sup> NEWTON, THOMAS. (1660-1721.) Born and educated in England and came to New England about 1688. One of the founders of King's Chapel, Boston. Member of its Vestry 1698, and Warden 1704. Judge in Admiralty, Justice of the Peace, and prominent lawyer for many years. Was employed by the government in the Witchcraft prosecutions. (See 1 Am. St. Tr. 523.) Of high integrity and exemplary conduct. At time of his death was Attorney General and Controller of Customs for Massachusetts Bay. A mural monument was erected to his memory in Kings Chapel by his grandson. His library is said to have been the greatest and best collection of books that had ever been offered for sale in this country. (See New England Hist. and Gen. Reg., Vols. 17 and 31, 1863, 1877, Washburn Judicial History of Massachusetts.)

<sup>6</sup> MEINZIES, JAMES. (1650-1728.) "Nathaniel Byfield was succeeded by James Menzies. Judge Menzies brought his commission

When the *Prisoner* was brought into Court the PRESIDENT ordered that his irons be taken off during the trial.

*Mr. Newton* (of counsel for the Queen). May it please your excellency, and the honorable commissioners of this Court: The prisoner at the bar stands charged, for that he, the said John Quelch, late of Boston, in the province of the Massachusetts-Bay, etc., mariner, lieutenant of the brigantine *Charles*, whereof Daniel Plowman, mariner, deceased, was late commander, notwithstanding the said brigantine, etc. Which articles when we have proved upon the prisoner at the bar, we doubt not your excellency, and the rest of the honorable commissioners of this Court will do him, our nation, and the whole world that justice, and to condemn and punish him for the same.

*Paul Dudley*, Attorney General. May it please your excellency and the rest of the honorable commissioners of this Court: The prisoner at the bar stands articted against, for, and charged with several piracies, robberies and murder, committed by himself and company, upon the high sea (upon the subjects of the King of Portugal, her majesty's good ally), the worst and most intolerable of crimes that can be committed by men. A pirate was therefore justly called by the Romans, *hostis humani generis*. And the civil law saith of them, that neither faith nor oath is to be kept with them; and therefore if a man that is a prisoner to pirates, for the sake of his liberty promise a ransom, he is under no obligation to make good his promise; for pirates are not entitled to law, not so much as the law of arms. For which reason it is said, if piracy be committed upon the ocean, and the pirates in the attempt happen to be overcome, the captors are not

with him when he came to Massachusetts, and arrived here on the ship *Samuel*, December 24, 1715. Was a native of Scotland, and a member of the Faculty of Advocates. He settled in Roxbury, but soon removed to Leicester where he lived for many years, being an early proprietor of that township. Represented the town in the General Court 1721 and succeeding years. He died at Boston." (Washburn Judicial Hist. of Mass.) The name is spelled both ways in the records of the day. He probably had returned to Scotland from America before he was made Chief Justice.

obliged to bring them to any port, but may expose them immediately to punishment, by hanging them at the mainyard; a sign of its being of a very different and worse nature than any crime committed upon the land; for robbers and murderers, and even traitors themselves, may not be put to death without passing a formal trial. And if the fate of the prisoner at the bar, with his company, had allowed them to have been overcome in their piracies, etc., and immediately hung up before the sun, it had been very just upon them. But being then suffered to live, and now brought into a court of justice, they are to be used, treated, and tried, as the laws of England, and our own country do direct. Hereupon I must observe, that until the statute of the 28th of Henry the 8th, all piracies, robberies and murder committed upon the sea, were tried before the admiral, his lieutenant, or commissary, after the course of the civil law; the nature whereof was, that before any judgment of death could be given against the offenders, either they must plainly confess their offenses (which they will never do without torture), or else their offenses be so plainly and directly proved by witnesses indifferent, such as saw their offenses committed, which was next to impossible to be had, therefore that statute enacted, that the said crimes should be triable in any county in England, by such and such commissioners, and the trial to be according to the course of the common law. This act continues in England in force to this day; and until very lately served for all piracies that were committed in the plantations, or any parts beyond the seas. For Kidd, the last pirate that went from this country, was tried upon the statute; but it proving very troublesome and chargeable to transport pirates and their witnesses from the several plantations, there was another act of Parliament made in the eleventh and twelfth years of the late King William, that provides principally and particularly for the trial of all pirates that are seized in any of the plantations. It is by virtue of this act of Parliament, and a commission pursuant thereto, that your excellency, and this honorable Court, are now sitting in judgment upon the prisoner at the bar, and

his vile accomplices; and though it may be thought by some a pretty severe thing to put an Englishman to death without a jury, yet it must be remembered, that the wisdom and justice of our nation, for very sufficient and excellent reasons, have so ordered it in the case of piracy; a crime which, as I before observed,, scarcely deserves any law at all. Besides, the late statute hath appointed such commissioners, as will take care to do equal justice to the prisoner on the one hand, and to the crown and allies of England on the other. The English word "pirate" is derived from a word that signifies "roving;" for pirates, like beasts of prey, are seeking and hunting upon the ocean, for the estates, and sometimes the lives of the innocent merchant and mariner. His character and description is thus; a pirate is one who, to enrich himself, either by surprise, or open force, sets upon merchants and others trading by sea, to spoil them of their goods or treasure, and oftentimes sinking their vessels, and bereaving them of their lives; and it is no wonder if piracy be reckoned a much greater and more pernicious crime than robbery upon the land, because the consideration of the general navigation, and commerce of nations, is far beyond any man's particular property. Besides, whereas robbery upon the land is most commonly from particular persons; piracy is from many, and oftener attended with the death of others. Thus it was in the case now to be tried; one of the captains of one of the Portuguese vessels being unfortunately, if not basely killed and murdered in the action. But before we proceed to the several articles upon which the prisoner is to be tried, I beg leave a little to set forth the aggravating circumstances of the crimes committed by these vile men. And to begin with their mutiny, their rebellious, inhuman, I wish I might not say, their murderous usage of their worthy commander, Captain Plowman; God knows how far their treatment of him might hasten his end; however, that must be answered for at a higher tribunal. The next thing I would observe in this matter, is, their commission which they obtained from her majesty's government of this province, a sword to fight the



open and declared enemies of her sacred majesty; but, instead of drawing it against the French and Spaniards, they have sheathed it in the bowels of some of the best friends and allies of the crown of England at this day; the Portuguese being confederate with her sacred majesty against the French and Spaniards, for the peace, rights, and liberties of Europe. This was the baseness, the treachery, and cowardice of this matter, that instead of fighting for honor with the French, or money with the Spaniards, they must go and surprise a few honest and peaceable men, and our good friends, in their lawful occasions, that neither thought, nor meant any harm. Thus a man falls before wicked men. The third thing I would observe, is the perfidious impudence of these men, for as they sailed along the coast of Brazil, they put in at one of two places, and assured the Portuguese of their friendship and kindness that their designs were against the French and Spaniard; and yet at the very next port, a few leagues distant, they robbed and plundered some of the neighbors and friends of those they had seen the day before. The fourth and last thing that I would mention is the number of their crimes; for it was not once, twice, nor thrice, that would serve their turns, but they go on in the repetition of their wickedness, till they were glutted, and thought they had enough of it. And as to the prisoner now at the bar, as his share in just and lawful prizes would have been at least double to any other, no doubt but the same measure will be of his guilt in all this matter. We shall now, may it please this honorable Court, proceed to prove the several articles charged upon the prisoner; and our proof will be partly presumptive, partly circumstantial, and partly positive and downright. The presumptive part of the proof is the manner of their coming to this place, being in that sort as renders them suspicious to everybody; but especially I would observe, their not being able to give any tolerable account from whence they came, or had their treasure. This was what induced their owners to give an information to the government of the matter; and our own law in this country against piracies, is very plain in this point of presumption.

The second proof that we shall offer, will be what we call circumstantial; and indeed the circumstances of this matter are so many, that render it undoubted, but that the prisoner, with his company, have been guilty of the articles charged upon him.

Then in the third place, there is that which we call positive and downright proof, viz., the confession and evidences of their accomplices, who are now the Queen's witnesses.

### THE EVIDENCE.

*John Colman* and *William Clark* produced Captain Daniel Plowman's commission, which was read, as also his instructions, and then his owners' orders; as also the said Plowman's letters from Marblehead to his owners; then a copy of the owners' letter was read, which they sent to the several islands, with his excellency's letter to the several governors, etc.

*Mr. Colman* made oath to their being true copies of their originals. *Mr. Clark* brought into court several long spadhas, a Portuguese ensign, two skins full of sugar, upon one of which was a direction, thought to be in Portuguese. *Edward Lyde* and *Samuel Frazon*, interpreters acquainted the court, that that skin of sugar was directed to a person in Lisbon; adding that if it had been Spanish, it would have been "al Signior," whereas it was "Para," etc. Whereupon the skins were opened, and full of what was adjudged to be Brazil sugar.

*Mr. Lyde* also swore that having been at Maderas, he had seen several hundreds of those seroins, or skins of sugar sent from Brazil, and that he verily believed, that what was now produced was Brazil sugar.

The ensign, or colors, were exposed also in court, and plainly seen to be Portuguese; and *John Colman* and *William Clark* made oath that the spadhas, skins, ensign, and other things, were taken out of the brigantine *Charles*, since her arrival here.

*John Noyes*, goldsmith, testified that he had received of the prisoner at the bar, since his arrival in the brigantine *Charles*, a considerable quantity of coined silver money, and saw many of the pieces to be Portugal money, and judged the rest to be so too, but he cannot swear it, the prisoner at the bar being then in his shop, and melting them down himself.

After this, *Mr. Treasurer*, with his deputy, came in with a bag of gold and treasure brought in the brigantine *Charles*, which being seized, was committed to the custody of the treasurer of the province and others, by order of the governor and council.

*Jeremiah Allen* swore that the bag he had now in court contained the treasure that was committed to the treasurer and others.

*Mr. Colman's* parcel of gold being opened, and he being asked whence he had that gold? made

answer that he received that, and all the rest of the owner's shares from the prisoner at the bar: upon viewing the coined gold, they were all found Portuguese gold, and several of the pieces were found to be coined in 1703.

The PRESIDENT observed, that the money being coined so lately, it was very improbable it should ever have been out of Portuguese hands, inhabitants of Brazil.

After this, some prints that came in the brigantine Charles were examined, and found to be in the Portuguese language.

A young NEGRO BOY, brought in by the prisoner at the bar, and company, was set up by order of the court, was examined, and the interpreters acquainted the court that he was a baptized negro, his name Joachim; that he lived with a Portuguese, his master's name Joseph Galeno; that he lived in the bay of All Saints in Brazil; that he was taken by an English brigantine, and that the prisoner at the bar was then on board the brigantine that took him; and that when he was taken he was pretty near the land in an open boat, with fish and other things in it; and that there were two Portuguese men in the boat at the same time.

The COURT ordered the interpreters to try the negro boy by Spanish and French questions: but it was found he understood neither.

*Mr. Newton.* May it please your excellency, and the rest of the honorable commissioners, we shall now proceed to an higher proof of this matter, by examining those that have been allowed to be the Queen's evidence against the prisoner at the bar, and the

rest of his company. We shall begin with Matthew Pimer, a skillful mariner, who was shipped by Captain Plowman himself, to go against the French, etc.

The PRESIDENT. What reason had you to believe they were Portuguese that you robbed? Can you speak, or understand Portuguese?

*Pimer.* No, sir; I do not understand the language, but believe them all to be Portuguese, because we took them upon the coast of Brazil; their lading and ensigns made me conclude they were Portuguese.

*The Queen's Counsel.* If your excellency please, we will examine the witness upon each of the articles and matters the prisoner at the bar is charged with; but before we come to the articles, we will examine him as to the prisoner's behavior towards Captain Plowman.

*Pimer.* Anthony Holding was the man that bolted the door upon the captain, the prisoner was then on shore, but came on board that night, and resolved to go to sea, and after the captain's death took command of the brigantine.

*The Queen's Counsel.* If your excellency please, we will now read the first article of piracy, and see what the witness can say to it: which being read. *Pimer.* There were five Portuguese on board that vessel.

Was the prisoner then in the command of the brigantine? *Pimer.* The prisoner was commander of the brigantine during the whole voyage.

Did none of them you took, ask the reason why you took them? *Pimer.* No, not that I know of; our interpreter, John Twist, had a great deal of dis-

course with the men we had taken, and said they were Portuguese that were taken now, and so afterwards: this first vessel was a small fishing vessel, out of which we took some fish and salt.

What do you know as to the second article? *Pimer.* I remember the taking of that brigantine, much in the same latitude with the other, but nearer the land; three white men, and two negroes were on board of her. This brigantine had some Brazil sugar and molasses, two white men and a negro entered themselves to go with us, our interpreter telling them we intended for the river of Plate, and to take the Spaniards; but afterwards as we took prizes, the two white men hid themselves, that their countrymen might not see them.

As to the third article? *Pimer.* I remember the taking of that vessel, the prisoner was then our commander, and went on board of her himself, she was taken in sight of land, and bound to Parnebuck.

Did not these people seem very much troubled that you should take them, you being Englishmen and at peace with them? *Pimer.* They were told, to the best of my knowledge, that we were Frenchmen.

As to the fourth article? *Pimer.* I remember the taking of this earthenware vessel within three leagues of the shore, she had three men on board her, came from Bayes, and bound to some neighboring port; we gave the men their boat again, and they went to Bayes, the prisoner was then on board the tender that took her.

What tenders do you mean? *Pimer.* We made use of one or two of the first vessels; we took and put some of our men on board of her, and kept her the greatest part of the voyage.

As to the fifth article? *Pimer.* Remember the taking of this boat within three leagues of the land, saw the flag of the castle at that time she was taken by the tender, Quelch and about twenty-four of our men on board her; we took two prizes this day; the boat we took at this time was staved by some of the company, as they told me, and afterwards sunk, the men we took on board the boat were all Portuguese, to the best of my knowledge.

As to the sixth article? *Pimer.* This vessel was taken with the tender and Quelch on board her; the negro boy Joachim was taken out of this vessel, and about fifty pounds in money. It was a canvas bag, to the best of my knowledge; there was some rice and farine, which we took out of her, and then let the men go away with their vessel after we had pillaged it.

As to the seventh article? *Pimer.* This vessel was taken near the tropic by Quelch, in the tender; but I was then on board the brigantine Charles, the quartermaster had the money that was taken out of her, being some coined gold and some silver; this vessel was taken very near the shore, about two leagues from the place whence she came, and was bound to Regineer. I saw her when they brought her out of the road, there was but one white man on board her, he said he was a Dutchman, and afterwards of Jutland. Because the captain would not give him a share equal

with the rest, he threatened he would inform against them; whereupon the major part ordered him to be sent on shore, giving him a gun, and some powder and shot; he could speak Portuguese very well. This vessel was taken near the island of Grandee.

As to the eight article. *Pimer*. I was in the boat that took the gold brigantine, and commanded to do it by the captain's order; we had found some of the gold before the captain came on board; he took the gold and carried it himself on board the brigantine Charles; I saw it weighed about three days after. I saw the coined gold taken, it had a late date, some a year or two standing. The vessel came from Spirito Sancto, was taken within two miles of the land, and under sail, had on board fourteen men, all whites, two women of good fashion. There were ten hands in the boat with me when we took her; there was nobody on board her could speak any language I understood. We kept them on board our brigantine till next day, and then gave them their brigantine again.

As to the ninth article. *Pimer*. This ship was taken by our brigantine Charles, the prisoner at the bar, then our commander, being on board; the river of Plate was there six or seven leagues over. We gave her chase about two days, she fired three guns at us before she put out her colors, which were Portuguese; her ensigns was not up till within half an hour before she was taken; I was not on board her, but Captain Quelch was, though many of our men had entered her before he did; she had about

thirty-five men and twelve guns. When this ship fired upon us, we had English colors flying; we kept the ship for some time, and took out of her what is set forth in the ninth article. This ship came from a Portuguese castle, had been out about twenty-four hours, and was bound for Bayes.

The PRESIDENT. Set up the negro boy who was taken in this ship.

*The Boy* swore his name is Emanuel; he was baptized; lived in the river of Plate; his name was Bastian; was a Portuguese, and captain of the ship that was taken by the brigantine, in the river of Plate; he saw one of Quelch's company shoot his master with a pistol; his master died immediately of that wound; he heard him say the words, "kill him;" there were no more men killed on board besides his master, only two wounded; his dead master was thrown overboard immediately after his death; he saw the prisoner at the bar come on board the Portuguese ship, armed with a cutlass and two pistols.

*The Interpreters* were directed to examine both the negro boys, what their negro masters bid them say of themselves when they came to New England; to which the negro boys made answer, that their masters bid them say, they were not Portuguese, but Spanish negro boys.

The PRESIDENT. *Pimer*, have you any thing further to offer to the Court relating to the prisoner?

*Pimer*. When we came about the latitude of Bermuda, the company ordered my journal to be taken from me, lest I had writ

something that might do them damage; and refusing to tear out myself what Captain Quelch would have had me, he tore it out himself, about five or six leaves, from October to February 20, that they committed their piracies. Captain Quelch made a speech, telling them, what they should say when they came on shore; as that we had met with some Indians, who had got great treasure out of a wreck, of whom we had our gold; and whereas we never had any gold from any Indians it being but once that any of them were on board of us, and then we did not trade with them.

*Clifford*, the second witness was sworn, and *Parrot* removed out of hearing.

The PRESIDENT. You are now to acquaint her Majesty's commissioners of this Court, of what you know relating to the prisoner at the bar, his being guilty of what is charged within those articles which you have heard read.

*Clifford*. Yes, sir, I shall; and I will begin with the bolting the door upon our Captain Plowman. Peter Roach, one of the company, kept the door by order of Anthony Holding, and some others that rose up to run away with the vessel. The prisoner at the bar was then on shore, but when he came on board, did not object against what was done, or what they were intended to do. Quelch then at that time had some command, but Holding was the ring-leader, and had the majority of the crew on his side. Pimer and myself offered to go to the captain, but the sentinel, that guarded the door with a sword in his hand, would not let us.

The PRESIDENT. Let the Ar-

ticles be read, and let the evidence say what he can to each of them.

*Art. 1, read. Clifford*. The first prize that we took anything out of, was a fishing boat, out of whom we took some fish and some salt, near Parnebuck, and that which induced me to think it was a Portuguese vessel, was, because it was taken near their own shore; but I do not understand the Portuguese language.

*Art. 2, read. Clifford*. This was the second vessel we took, a brigantine that we carried with us during the voyage, Quelch was then our commander, and went on board the said vessel himself.

*Art 3, read. Clifford*. I remember well the taking of this vessel by Quelch himself; we carried a pilot along with us, who told us they were Portuguese. John Twiss, who is since dead, was the linguister's name. One of the prisoners, who was first taken, understood a little English by this time, and then asked what was the reason that we, being English, took the Portuguese. And one of our men, named Isaac Johnson, the Dutchman was whipped for telling them we were English.

*Art. 4, read. Clifford*. I remember the taking of this vessel very well, she was taken by one of the prize vessels; I saw the earthenware that was taken; we were all along, during the captures, in sight of the shore and near Mora.

*Art. 5, read. Clifford*. I remember the taking of this boat by Captain Quelch; the men that we took were Portuguese, as we were told by our interpreter. I do not remember any of the vessels we had yet taken had colors.



*Art 6, read. Clifford.* I saw the bag of money, but cannot tell how much there was of it. The negro boy, Cuffee, was then taken; at first he waited on the whole ship's crew, but then was sold at the mast to Benjamin Perkins. This vessel was taken by a tender, with about 50 pounds, all white money.

*Art 7, read. Clifford.* I remember this vessel was taken by our tender, near the island of Grandee; I saw the sugar brought on board (the brigantine Charles) and some of the gold; there was only one Dutchman in this vessel, who entered himself with us for the voyage. But because the company voted he should not have a full share, he threatened, when he came on shore, what he would discover; upon which they voted to put him on shore, Captain Quelch being present at their vote.

*Art. 8, read. Clifford.* I was not in the boat that took this brigantine. I saw the hundred pound weight of gold dust on board the brigantine Charles, which Captain Quelch shared among us. There might be about fifteen or sixteen men, with two women, on board the brigantine that was taken, she came from Spirito Sancto, and was bound for Rivo de Januero, she was taken by our own pinnace, with half a score men, the prisoner not in it.

*Art. 9, read. Clifford.* I was on board this ship when she was taken, and so was the prisoner at the bar. It was thought the captain of her was wounded before we boarded her; but there was some dispute among the men, which of them it was killed him; Captain Quelch commanded the

brigantine when we took her. We took ten or twelve barrels, and a pipe of beef in her, and sundry other things. I saw such an ensign as that which was shown in court in the forenoon, on board the ship. We took also the negro boy, who was in the court in the forenoon.

*Parrot* the third witness for the Queen was now brought in.

The PRESIDENT. Parrot, you are now to give an account to her Majesty's commissioners of this court of what you know relating to the prisoner at the bar, his being guilty, of what he is charged with, in those articles which you have heard read. *Parrott.* I can say nothing as to the prisoner's carriage towards Captain Plowman, but the cabin door was bolted upon him, and I believe, was a contrived thing before we went off of the land; the prisoner at the bar was not on board till night. When the captain was thrown overboard, then he took upon him the command, and ordered us to sail to sea.

*Art. 1, read. Parrot.* We were not in sight of land, but believe the vessel to be Portuguese; being upon the Brazil coast.

*Art 2, read. Parrot.* I saw the captain of this vessel, which was a brigantine; she was taken by the little fishing shallop, commanded by Captain Quelch. I was afterwards on board her, and saw the sugar brought on board the brigantine Charles.

*Art 3, read.* Do you remember the captain of this vessel *Parrot.* I remember it very well; Captain Quelch was on board the vessel that took her; we kept her two or three days.

*Art. 4, read.* What do you know concerning the taking of



this vessel? *Parrot.* I remember the vessel with earthenware; it was an open vessel, taken in sight of land. There was molasses in the pots; there were men and women on board her, whom we took on board the brigantine *Charles*. We lost the boat's rudder, so that she could not sail, wherefore we took her in tow; and taking out what we had need of, we then sunk her. Captain Quelch and I were in the brigantine that took this vessel.

*Art. 5, read.* Do you remember the captain of this vessel? *Parrot.* Yes; I had some of the silk taken in this vessel; so much as would make me a pair of breeches. We took all these prizes after the first fishing boat, in sight of the shore, as near as I can remember.

*Art. 6, read.* *Parrot.* I remember this caption; the prisoner at the bar was at it; they were Portuguese that were on board. I was put on board that boat that *Cuffe* was taken out of; and out of that boat I took about twenty or thirty pounds of Portugal money. She had rice and farine in her, which we took out of her.

*Art. 7, read.* *Parrot.* I believe this was the brigantine we took at an anchor before the town. I went to fetch her myself; Captain Quelch went over with us; we took four or five chests of Brazil sugar; all the men had ran away, and left the brigantine, only one man, who at first said he was a Dutchman, but afterwards we found he was a Jutelander.

*Art. 8, read.* *Parrot.* Quelch did not take this vessel; she was taken by our boat, but I was not in the boat that took her.

Captain Quelch, the quartermaster, and carpenter, shared the hundred pound weight of gold dust among us.

*Art. 9, read.* *Parrot.* I was present at the caption of this ship. Captain Quelch was the commander of the brigantine; we saw the said ship two or three days before we took her. I saw the colors, that were in court today, first on board our brigantine. We took beef, sails, shot, powder, four guns, and an hundred pieces of eight and odd; and a negro boy, whom one George Norton bought. The captain was thrown overboard before I came on board; he was said to be killed by Scudamore, our cooper.

The PRESIDENT. And was the prisoner at the bar captain of your brigantine during all this time that you took these several vessels you have mentioned? *Parrot.* Yes; and a little before we came in, it was agreed that we should say, we took our gold out of a vessel, that ran ashore about Port Maranto, but that the Indians were first at work upon her; Anthony Holding first called us upon deck; Pimer told me they tore out part of his journal, and that they ordered every one to throw overboard whatever Portuguese prints they had.

The PRESIDENT. Pimer, or Clifford, have you anything further to offer? *Clifford.* I saw the captain take Pimer's journal out of his hands, and order it to be torn out, and all Portuguese prints to be thrown overboard. We were all upon the deck, when it was concluded we should say, we had taken the gold out of some wreck that

the Indians had acquainted us with.

*Pimer.* I saw the man whipped that told them the brigantine belonged to New England. The captain and quarter-master ordered him to be whipped; Anthony Holding

was the man who whipped him. I was down below when the agreement was made, what we should say when we came ashore, and was abused by Peterson when I came upon deck, because I was not present.

*Mr. Newton.* May it please your excellency. We shall now (though there be no necessity for it) prove, that long before, and at the time that these several piracies, etc., were committed, her sacred majesty and the king of Portugal were entered into a strict alliance, etc.

Two London Gazettes, dated in the months of May and July, 1703, were produced, and two paragraphs were read, viz.:

"Whitehall, May 24. The Treaty of Alliance, between the Emperor, her Majesty, the King of Portugal, and the States General, which has been so long talked of, was signed at Lisbon the 16th instant, N. S., and is brought hither by an express.

"Whitehall, July 14. Yesterday the ratification of the treaties, lately concluded at Lisbon with the King of Portugal, passed the great seal."

The PRESIDENT. Gentlemen of the queen's counsel, have you now done on the queen's part?

*The Queen's Counsel.* Yes, sir; we have gone through the course of the queen's evidence against the prisoner at the bar.

The PRESIDENT. Captain Quelch, this court is now ready to hear what you have to offer for yourself.

*Quelch.* My counsel informs me that he hath sundry matters of law to offer to your excellency on my behalf.

The PRESIDENT. Mr. Meinzies, if you have any matters of law to offer in behalf of the prisoner at the bar, we would hear it.

*Mr. Meinzies.* I have several matters of law to offer in behalf of the prisoner, etc., but before I mention them, I pray that I may not be thought any wise to justify or extenuate the horrible crimes that are charged upon the prisoner; for they are such, that all the world must needs detest and abhor. But, as it is equal justice to acquit the innocent, as to condemn the guilty, so if the evidence which has been produced against the prisoner at the bar, do not amount to make him guilty of the several articles he stands charged with, this court must needs acquit him.

The first objection I make to the evidence, is what was last produced, I mean the Gazettes.

*Mr. Newton.* The Gazette is published by authority, and has been often allowed as good evidence.

The PRESIDENT. The stress of this matter does not lie upon the alliance. Suppose they were not in alliance with the crown of England, yet if there was no war between the two crowns, the prisoner

at the bar, with his company, had been guilty of piracy. Kidd was hanged for robbing the Great Mogul.

*Mr. Meinzies.* But may it please your excellency, suppose we should bring proof, that the gold dust imported in the brigantine Charles, and now shown in court, to be Spanish gold dust.

The PRESIDENT. Can you prove it?

*Mr. Meinzies.* We have a goldsmith here, whom I desire to be sworn.

*David Jess.* Have seen a great deal of the gold dust that was brought in by these pirates, but hath not so much skill as to tell, whether it be Spanish or Portuguese dust; believes nobody else can distinguish one from the other.

a very vain thing, for had the dust been dug in Mexico, yet if our friends have it in keeping, it is piracy to take it from them. Besides, what answer can you give to all the coined gold shown in court, with the other things, which appear plainly to be Portuguese?

The PRESIDENT. You attempt

*Mr. Meinzies.* The next thing, in point of law, that I would offer upon the evidence against Captain Quelch is, that the several witnesses differ very much as to the places where the several vessels were taken, and as to the number of persons that were on board those vessels.

The PRESIDENT. That difference is very immaterial; for it matters not what number of Portuguese there were on board, so there were any. And as to difference of place, or latitude, two artists may differ in their observations at the same time; and you have heard the reason why one of the witnesses cannot be so positive as to his latitudes, viz. because Captain Quelch cut out his journal; but he, and all the rest are positive it was done upon the coast of Brazil, in their very harbour, and in sight of their forts and castles.

*Mr. Meinzies.* It is plain, that none of the witnesses understand the Portuguese language; and it ought to be very positive evidence to take away a man's life.

The PRESIDENT. I believe her Majesty's commissioners, now present, will think they have very positive proof; however, they are the judges of that.

*Mr. Meinzies.* The next thing in point of law, that I would offer in behalf of Captain Quelch, is, that whereas, in the last article, he is charged with the murder of the Portuguese captain; it is well known he was not the man that did the fact. Now, by the civil law, only he that gives the stroke, wound, or the like, is the murderer: so says Molloy, in his treatise *De Jure Maritimo*, in his chapter of piracy.

*Mr. Newton.* But the same book says, that if the common law have jurisdiction of the cause, all that are present, and assisting at such a murder, are principals. Now the statute 28 Hen. 8, makes all piracies, robberies and murder upon the high seas, triable according

to the rules of the common law, as if they had been committed upon the land.

*Mr. Meinzie.* May it please your excellency, I have yet one thing further to offer against the queen's witnesses in this matter: that is, that they are not competent witnesses, having not had her Majesty's pardon.

*Mr. Newton* It has never been thought convenient to give approvers their pardon, until they have actually convicted their accomplices; lest, after having their pardon, they may refuse it; although after they have convicted those they approve, their pardon is *ex debito justitiae*. This is the opinion of my Lord Coke in his Pleas of the Crown, and so has the practice been since.

*Mr. Meinzie.* I have but one thing more, may it please this honorable court, to offer in behalf of Captain Quelch, that is upon the late act of Parliament made in the late reign, which appoints this honorable court for the words of it are: "That the proceedings of this court, in examining, trying and condemning pirates, shall be according to the civil law, and the methods and the rules of the Admiralty." Now, by the civil law, which is founded upon the reason and custom of nations, no accomplice can be a witness, being equally guilty with those he accuses. So says Wiseman, doctor of the civil laws, in his Treatise of the Civil Law, chapter 8, page 73. And in the same book, touching examining witnesses upon oath, page 114, and 119. And the same author observes, that among the Romans, when a man was criminally accused, they were so tender of the lives and safety of their people, that to convict a man by proof, was no easy, but a very difficult thing, etc. The allowing these witnesses will be inconsistent with the act of Parliament itself, whereby the persons accused have not only the benefit of cross-examining the witnesses, but also of bringing evidences for their own vindication; and it may be thought as proper to bring some of their own company for their clearing, as the other evidences for the accusing them. As to witnesses in piracy, see Coke's Institutes, part 3, page 24, 25. As to the admiral's power of jurisdiction, Coke's Institutes, part 4, page 134; and Proceedings on Piracy, page 147, 154 and part 3, page 119, 192.

*The Queen's Advocate.* What Mr. Meinzie says, may it please your excellency, of the civil law, is so far certain, that the witnesses in cases of piracy, by the methods of the civil law, must be such as are indifferent, and saw the fact committed, but no ways concerned in the doing of it, but this method of trying of pirates, the statute of Henry 8, complains of as too strict, and tending rather to let pirates escape, than be brought to justice; and does therefore perfectly reject it, and does enact, that for the future, all piracies, etc., committed upon the high seas, shall be tried according to the course of the common law, as if they had been committed upon the land.

Now it is very well known, that by the common law, accomplices are many times admitted to be approvers against those that were partners with them in their crimes; and, indeed, in many cases, there

happens to be no other way to bring criminals to their just punishment, but by singling out some of their company, that may be the least guilty, and make use of them to convict the rest.

*Mr. Meinzie.* I do not take myself to be thoroughly answered by Mr. Advocate, as to what I offered in the last place; for I take the case of pirates that may be tried in England, upon the statute of Henry 8, to differ very much from the case of pirates that are tried in the plantations, by virtue of the new statute: for, admit that in the former case accomplices or approvers may be allowed as witnesses; since pirates that are tried upon that statute are allowed a jury, yet in the latter case, those that are tried for piracy in the plantations, being deprived of the benefit of a jury, the statute seems to design an equivalent to a jury, by directing the commissioners of such courts, to proceed according to the civil law, and method of the court of admiralty.

*The Queen's Advocate.* As to the method of the court of admiralty, it is now above 160 years since the statute of Henry 8, was made; a term long enough to make a method of any court; for ever since that time hath the court of admiralty proceeded in cases of piracy according to the rules of the common law. And then, as to that other part of the new statute, relating to piracy, that says, this court is to proceed according to the civil law; with submission, we understand it to be of the summary way of proceeding by the commissioners, and depriving the prisoner of a jury; for it is most certain, that the late statute against piracy doth strengthen and establish the statute of Henry 8. And it would be very odd to suppose that what the first act of Parliament in these cases had rejected, and condemned, the method of the civil law, in the trial of pirates, etc., the second act of Parliament should be reconciled to that method, to restore and set it up in the plantations, especially when the title of the new act is an act "For the more effectual suppression of piracy," etc.

The PRESIDENT. Captain Quelch, if you have anything further to offer for yourself, or if you would cross-examine the witnesses, the Court will hear you.

*Quelch.* I desire Pimer may be asked, whether there was any bolt upon the captain's cabin door, when we first sailed.

*Pimer.* It was fastened with a marlin-spike.

*Quelch.* Was I then on board?

The PRESIDENT. The witnesses have answered as to that already.

*Quelch.* I desire the witnesses may be asked, whether they know the gold dust to be Portuguese dust.

The PRESIDENT. This is not material, Captain Quelch.

*Quelch.* I desire Pimer may be asked, how he knows the

first prize was taken the 15th of November. *Pimer*. I say it was on or about that day; I set down the very day in my journal, but it was torn out; I cannot swear to a day.

*Quelch*. How many ton was the second vessel that was taken?

The PRESIDENT. Captain Quelch, this is not cross-examining the witness, but rather examining him over again; if you wish to say anything to the purpose, you should acquaint this Court, where you took those quantities of gold dust, and coined gold, those negroes, etc., that have been shown to this Court; if they were taken from the French, or Spaniards, let us see some of them here, or some evidence of their being so taken.

*The Queen's Advocate*. We are now gone through the course of the Queen's evidence against Captain John Quelch, the prisoner at the bar; and besides what his accomplices have declared against him, the circumstances of this matter are so many, as to put it beyond all question, but that the prisoner at the bar is guilty of what he stands charged with; for upon his trial, we have seen the King of Portugal's ensign flying, his coin current, his servants, I mean his negroes waiting, his merchandise exposed to public view, insomuch, one would think that we were in Portugal itself. Upon the whole matter, we must leave it to her majesty's honorable commissioners of this Court to consider whether Captain John Quelch is not guilty of the several piracies, robberies, and murder, that he stands charged withal.

The Court was now cleared, and after an hour's consideration, the Court opened again.

The PRESIDENT. John Quelch, it is now six days since this Court first sat, by her majesty's special command to myself, and these gentlemen commissioners, before whom you have been indicted upon, or charged with several articles of piracies, robberies, and murder; and you have been heard thereupon. This Court hath weighed and considered the several evidences that have been produced on her majesty's behalf against you, and your own allegations for you; and upon the whole, have found, and adjudged you Guilty of the several articles of

piracy, robbery, and murder, wherewith you are charged, and have agreed that sentence should be pronounced against you for the same accordingly.

*The Register.* Make proclamation of silence.

*The Cryer.* All manner of persons are commanded to keep silence while judgment is giving, upon pain of imprisonment.

The sentence of death as the law directs in cases of piracy was then pronounced by the PRESIDENT upon *Captain Quelch*.



## THE TRIAL OF JOHN LAMBERT AND CHARLES JAMES FOR PIRACY, BOSTON, MASSACHUSETTS, 1704.

*June 20.*

The Court was opened, and proclamation made. Lambert, Wilde, Scudamore, Roach, Perkins and James were set to the bar, and after some little time spent, John Lambert and Charles James desired that they two might be tried by themselves; upon which the COURT ordered the rest to be taken from the bar; and then the COURT proceeded to examine the witnesses on behalf of the Queen against the prisoner.\*

The PRESIDENT. *Pimer*, what do you know as to Lambert's being concerned in confining Captain Plowman, and altering the voyage? *Pimer*. I cannot say that either he or James were concerned in bolting the cabin door, but they were both on board when we came to sail; and though they declared they were unwilling to go to the southward, yet after Captain Plowman's death, there was a consultation held, and both Lambert and James were at it; and I know nothing to the contrary, but that they consented with the majority.

The COURT. Please to let the Articles be read to the witnesses, and then ask, how far Lambert and James were concerned in all or any of them.

*Art. 1*, read. *Witnesses*. Lambert and James were on board when we took that vessel, and so

at the second and third, fourth and fifth.

The PRESIDENT. And as active as any of the rest? *Witnesses*. Yes.

*Art. 6*, read. *Witnesses*. They were both on board our brigantine when this was done, and assisted at the seventh and eighth captions.

*Art. 9*, read. *Witnesses*. Lambert was on board the tender, above a mile off at that time, but James was one that boarded the ship.

The PRESIDENT. Lambert and James, would you ask the witnesses any questions?

*Lambert*. I was sick down in the gun room when they bolted the door upon the captain, and never gave my consent to go to the southward. What I did, I was forced to.

The PRESIDENT. *Pimer*, did

\* Three negroes belonging to Captain Quelch were first put to the bar and pleaded not guilty to the charges of piracy. It being proved that they were simply cooks on board the vessel and handled no arms, the COURT, after a short conference, declared them *not guilty*.

you ever hear Lambert protest against any of these piratical actions, or did he desire to be set on shore. *Pimer*. He did desire to be set on shore; but it was before the captain went from Nantasket. I never heard any of them manifest their dislike as to our going to Brazil, but were as forward as the rest were.

The PRESIDENT. *Pimer*, do you know whether Lambert and James had their share of the treasure? *Witnesses*. They had each of them their shares.

The PRESIDENT. What say you, *James*?

*James*. I was constrained against my will to go to sea, and was deluded by false pretenses.

The PRESIDENT. *Pimer*, what say you as to *James*?

*Pimer*. I cannot say that he said anything of what he pretends he said, but that he was unwilling to pilot the ship, which I judged was, because he was averse to the voyage.

The PRESIDENT. Did you hear Lambert advise the captain to go off from the coast of Brazil

against some known enemy? *Witnesses*. No, we never heard him give any such advice. *Pimer*. I have heard him several times declare himself against the voyage, but never express himself sorrowful for, or protest against any of the piracies, nor *James* either.

The PRESIDENT. You have brought in a very considerable treasure with you, whereof each of you have had your shares. Whence had you it? Where are the French and Spaniards you took it from? *James*. It was the commander did it; and we were not on board the vessel that took the gold dust. The reason we accepted of our shares was, because otherwise they would have killed us, or set us upon some desolate island, where we should have been starved. *Lambert*. I was only at the taking of two of the vessels; and you may be sure I would never have come home in the vessel, if I had thought I had done anything amiss, or that I should have been arraigned for.

The *Prisoners* having nothing further to offer, the Court was ordered to be cleared, and in some small time after opened again, and the prisoners sent to the bar.

The PRESIDENT. John Lambert and Charles James; you have been arraigned upon several articles of piracy, etc., committed by you (with others) upon the subjects of her majesty's good ally, etc., to which you have pleaded Not Guilty; you have been heard thereupon, what you had to say for yourselves; this Court having considered the evidence for the Queen against you, and your own allegations for you, do adjudge each of you guilty of the several articles of piracy, etc. What have you to say why sentence of death should not be pronounced against you?

*The Prisoners.* We must leave it to God and your honors; we are as innocent as the child unborn of the things we are charged withal.

The PRESIDENT. Harken to the sentence of the Court against you.

Then sentence was pronounced by the PRESIDENT of the Court, as the law directs in cases of piracy.

THE TRIAL OF CHRISTOPHER SCUDAMORE  
AND THE REST OF CAPTAIN QUELCH'S  
CREW FOR PIRACY, BOSTON, MASSA-  
CHUSSETS, 1704.

*June 20.*

Benjamin Perkins, William Wilde, Christopher Scudamore and Peter Roach were set to the bar.

It was ordered that Scudamore be tried by himself, and the rest taken from the bar.

The several articles being read to the witnesses, they all swore that Scudamore was with them all the voyage; that he was very active in everything, and that he had his share of the gold.

*The Queen's Advocate.* May it please your excellency, we shall further prove against the prisoner at the bar that he was the only man who gave the mortal wound to the captain of the Portuguese ship.

The PRESIDENT. Pimer, what do you know as to that? There was a controversy on board our brigantine, concerning who it was that killed the captain of the Portuguese ship, Scudamore, saying, it was he, and another said, it was he that did it.

The PRESIDENT. Set up the negro boy who was taken in that ship.

The *negro boy* being set up, was bid to look upon the prisoner and say, whether it was he who killed his master. And the interpreters reported to the Court, that the negro boy said

that was the man who killed his master, and that he killed him with a petard; that his master fell down immediately, and did not speak a word.

The PRESIDENT. What say you, Scudamore? *Scudamore.* I did not kill the captain of the Portuguese ship.

The PRESIDENT. Where is your gold? *Scudamore.* I cannot tell; what I said upon my first examination about it is false.

The PRESIDENT. Have you anything farther to say? *Scudamore.* No.

After this a petition was given into court, signed by several of the prisoners, viz.: William Wilde, John Dorothy, Dennis Carter, Peter Roach, Francis King, John Pitman, Richard Laurence, Benjamin Perkins, Erasmus Peterson, John Carter, Nicholas Richardson, John King, James Austin, William Jones and Charles King; praying that

they might withdraw their several pleas of not guilty, and be admitted to confess and plead guilty, hoping thereupon for the queen's mercy, etc.

Upon which they were each of them asked whether they set their hands to that petition? And they all severally owned they did.

The PRESIDENT. You who have here subscribed this petition, must be told, that your commander, and some others of your company, have had their trials, and are found guilty. We do not take your pleading guilty now to be any submission, nor will it of itself entitle you to mercy. This Court can make no bargain with you. If any of you can be distinguished as being forced away, professing against the voyage, sickness or the like, this Court will consider it, so far as is proper for them.

The PRESIDENT. You must ask each of the prisoners, one by one, whether they are guilty, or not guilty, of what they are charged with.

*The Register.* How say you, Richard Lawrence, are you guilty or not guilty?

*Richard Lawrence.* Guilty.

So said Erasmus Peterson, John Carter, Francis King, Peter Roach, etc., the rest of the petitioners.

After this, *John Miller* was set to the bar.

The queen's witnesses being examined about John Miller, made oath, that he was on board the brigantine Charles during the voyage, and did not protest against going upon the coast of Brazil; that he was in health, and serviceable at the time of every caption, as the rest were, and had his share of the gold, etc., that was taken.

*Miller* said he was sick during some part of the voyage.

*Witnesses.* He was so, but was well again before we made our first caption. (Article 4th read.) He was at this caption well in health, and consenting to it; so at the 5th and 6th articles, and at the taking of the prize in the 7th article. (Article 8th read.) He was then on board the tender that took the gold vessel. (9th Article read.) He boarded that ship with sword and pistol.

The PRESIDENT. What have you to say for yourself? You

have heard what has been proved against you. *Miller.* I was at the taking of the ship and a bark; but did not know what they were, for they showed no colors.

The PRESIDENT. Pimer, did you ever hear any of your company say, as if Miller was one of Avery's crew? *Pimer.* I heard some of them say, they heard him say so himself; so said Clifford.

*Miller.* I was none of Avery's company.

The PRESIDENT. Set John Templeton to the bar.

The *Queen's Witnesses* being sworn deposed that John Templeton was on board the brigantine all their late voyage, and that he did sometimes bear arms; but being not above fifteen years of age, they allowed him but half a share, which his master was also to have; that he was for two months together cook on board the tender but being but a boy, he had no vote with the rest of the company, but was ordered as every one pleased.

*Henry Franklin.* The prisoner at the bar was his servant and that he put him on board the brigantine Charles as such, upon Captain Plowman's request; that he saw his boy the Sunday evening after the pirates came in, and that his share of gold was never in his own keeping, for that the company would not trust him with it, but he received it for him.

The PRESIDENT. Templeton, what have you to say?

*Templeton.* I have nothing to say but that my master sent me out, and I knew not whither we were going.

*William Whiting* was set to the bar, and charged with the same articles of piracy, etc., who thereupon pleaded *Not Guilty*.

*Pimer* and the rest of the witnesses being examined concerning him, informed the Court that from the first time of their coming upon the coast of Brazil, until their coming home, Whiting was sick, and never bore arms, being utterly incapable of doing anything.

The PRESIDENT. Had he any share? *Witnesses.* He had sixteen ounces allowed him by the company; but they told him it was not for his deserts, but out of their generosity that they gave it to him.

The PRESIDENT. Did he express any dissatisfaction at what was done? *Witnesses.* No, not that I heard; but he was taken sick on the beginning of November, and came very sick ashore.

*S. Sewall.* Whiting, upon his examination, told me that he had been acquainted with Captain Plowman at New York, and that it was out of respect that he had for him that he came hither, and went the voyage.

*William Clark* sworn, deposed, that Captain Plowman sent for Mr. Colman and himself, and recommended the prisoner to them as a person fit to be clerk or secretary on board the ship, and to take an account of all their affairs; and that Captain Plowman's letters to them were written by the prisoner; and when he came ashore, he was in a very low condition; but said, when he was able, he would do them all the service he could.

*Pimer.* I know of his writing letters from Captain Plowman.

The PRESIDENT. Would you say anything yourself, Whiting?

*Whiting.* I never was in any action, being sick all the while we were on the coast of Brazil, and did not discover their piracy when I came on shore, because I was then very sick, and like to die.

## THE JUDGMENTS AND SENTENCE.

*June 21.*

The Court being opened, and proclamation made, John Templeton and William Whiting were set to the bar.

The PRESIDENT. John Templeton, this Court has considered your case, and have been very indulgent to you in regard of your youth, and have adjudged you to be Not Guilty—And

you also, William Whiting, the Court has considered of your case, and have adjudged you also to be Not Guilty.

Upon which each of them upon their knees thanked the Court.

Christopher Scudamore and John Miller were set to the bar.

The PRESIDENT. Scudamore and Miller, upon hearing the Queen's evidence against you, and your own allegations for yourselves, this Court doth adjudge you both to be Guilty of what you have been charged with. What have you to say why sentence of death should not be passed against you? *Scudamore*. I had no hand in altering the voyage, nor killing the Portuguese captain. *Miller*. I was never active after the voyage was altered.

The PRESIDENT. Attend to the sentence of this Court against you.

Then sentence was pronounced by the President of the Court, as the law directs in cases of piracy, etc., against the said Scudamore and Miller.

The PRESIDENT. Set seven of them to the bar.

Then William Wilde, John Dorothy, Dennis Carter, Peter Roach, Francis King, John Pitman and Richard Lawrence were set to the bar.

The PRESIDENT. You, and each of you, have been arraigned upon several articles of piracy, etc., to which you have severally pleaded guilty. What have you to say why sentence of death should not pass upon you? *The Prisoners*. Nothing.

The PRESIDENT. Then attend to the sentence.

Then sentence was pronounced by the President of the Court, as the law directs in cases of piracy, etc., against the said seven persons last named.

The PRESIDENT. Set the rest to the bar.

Benjamin Perkins, Erasmus Peterson, John Carter, Nicholas Richardson, John King, James Austin, William Jones and Charles King were set to the bar.

The PRESIDENT. You, and every of you, have been arraigned upon several articles of piracy, robbery, and murder, unto



which you, and each of you, did plead guilty. What have you to say why sentence of death should not pass against you for the same. *The Prisoners.* We leave ourselves to God Almighty.

The PRESIDENT. Attend then to the sentence.

Then sentence was pronounced by the President of the Court, as the law directs in cases of piracy, etc., against the eight persons last named.

And then the prisoners were all remanded to prison, and the officer charged to take great care of them.

### THE EXECUTIONS.

On this Friday, June 30, 1704, John Quelch, John Lambert, Christopher Scudamore, John Miller, Erasmus Peterson and Peter Roach, were executed in Charles River, between Broughton's warehouse and the Point.

AN ACCOUNT OF THE BEHAVIOR AND LAST DYING SPEECHES OF THE SIX PIRATES THAT WERE EXECUTED ON CHARLES RIVER, BOSTON SIDE, ON FRIDAY, JUNE 30, 1704, VIZ. CAPTAIN JOHN QUELCH, JOHN LAMBERT, CHRISTOPHER SCUDAMORE, JOHN MILLER, ERASMUS PETERSON AND PETER ROACH.

On Friday, the 30th of June, 1704, pursuant to orders in the dead warrant, the aforesaid pirates were guarded from the prison in Boston, by forty musketeers, constables of the town, the provost-marshal and his officers, etc., with two ministers, who took great pains to prepare them for the last article of their lives. Being allowed to walk on foot through the town, to Scarlet's wharf, where the silver oar being carried before them, they went by water to the place of execution, being crowded and thronged on all sides with multitudes of spectators.

At the place of execution, they then severally spoke as follows, viz.

1. *Captain John Quelch.* The last words he spoke to one of the ministers at his going up the stage, were: "I am not afraid of death; I am not afraid of the gallows; but I am afraid of what follows. I am afraid of a great God, and a judgment to come." But he afterwards seemed to brave it out too much against that fear; also when on the stage, first he pulled off his hat, and bowed to the spectators, and not concerned, nor behaving himself so much like a dying man as some would have done. The ministers had, in the way to his execution, much desired him to glorify God at his death, by bearing a

due testimony against the sins that had ruined him, and for the ways of religion which he had much neglected. Yet now being called upon to speak what he had to say, it was but thus much: "Gentlemen, it is but little I have to speak. What I have to say is this, I desire to be informed for what I am here; I am condemned only upon circumstances. I forgive all the world. So the Lord be merciful to my soul." When Lambert was warning the spectators to beware of bad company, Quelch joining, "They should also take care how they brought money into New England to be hanged for it."

2. *John Lambert*. He appeared much hardened, and pleaded much on his innocence. He desired all men to beware of bad company; he seemed in a great agony near his execution. He called much and frequently on Christ for pardon of sin; that God Almighty would save his innocent soul. He desired to forgive all the world. His last words were: "Lord forgive my soul. Oh, receive me into eternity. Blessed name of Christ. Receive my soul."

3. *Christopher Scudamore*. He appeared very penitent since his condemnation; was very diligent to improve his time going to, and at the place of execution.

4. *John Miller*. He seemed much concerned, and complained of a great burden of sins to answer for; expressing often, "Lord, what shall I do to be saved?"

5. *Erasmus Peterson*. He cried of injustice done him; and said: "It is very hard for so many men's lives to be taken away for a little gold." He often said, "His peace was made with God; and his soul would be with God;" yet extreme hard to forgive those, he said, wronged him. He told the executioner, "He was a strong man, and prayed to be put out of misery as soon as possible."

6. *Peter Roach*. He seemed little concerned, and said but little, or nothing at all.

*Francis King* was also brought to the place of execution. but reprieved.

## THE TRIAL OF LAWRENCE PIENOVİ FOR ASSAULT AND BATTERY, NEW YORK CITY, 1818.

### THE NARRATIVE.

An Italian painter who was living in New York had a very beautiful wife, of whom he was very jealous. Suspecting her of being unfaithful to him, he bit off her nose as a punishment. In the Criminal Court, where he was tried for assault, his counsel tried to excuse him on the plea of insanity, but when the lawyer for the People pointed out to the jury that this kind of a plea was generally resorted to in desperate cases and ought to be strictly scrutinized, and the Judge had told them that one cannot excuse himself for the commission of a crime by alleging an insane condition arising from unruly passion, the jury promptly found him guilty and he was sentenced to a term in prison.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, August, 1818*

HON. CADWALLADER D. COLDEN,<sup>2</sup> *Mayor*.

HON. JAMES WARNER, *Special Justice*.

*August 12.*

The *Prisoner*, an Italian, was indicted for an assault and battery committed on Elizabeth Pienovi, his wife, on the 29th of July, 1817, and the indictment contained a count charging him with maiming the said Elizabeth by biting and tearing off her nose.

The prisoner's counsel had, before the trial, applied to the court for a jury *de mediatate lingue*, according to the stat-

<sup>1</sup> New York City Hall Recorder, See 1 Am. St. Tr. 61.

<sup>2</sup> See 1 Am. St. Tr. 4.

ute; and the sheriff returned a competent number of aliens; the case was brought to trial today.

*Pierre C. Van Wyck*,<sup>2a</sup> District Attorney, for the People.

*Mr. Fay*<sup>3</sup> and *William M. Price*<sup>4</sup> for the Prisoner.

<sup>2a</sup> See 4 Am. St. Tr. 547.

<sup>3</sup> See 1 Am. St. Tr. 718.

<sup>4</sup> PRICE, WILLIAM M. (1786-1846.) The foremost criminal lawyer in New York City in his day. No lawyer has or will appear so often in this series as Mr. Price. Already he has been seen as counsel in the following trials: Mezarra (libel), 1 Am. St. Tr. 62; Wittenburgh (procurement), *Id.* 362; Noah (opening letter), *Id.* 675; Spooner (libel), *Id.* 685; Noah and Spooner (contempt), *Id.* 694; Smith (murder), *Id.* 780; Degey (disturbing religious worship), 2 Am. St. Tr. 172; Van Pelt (bigamy), *Id.* 203; Johnson (murder), *Id.* 515; Spence (false imprisonment), *Id.* 541; Sellick (murder), *Id.* 839; Gill (opening letter), *Id.* 853; Dayton (larceny), *Id.* 918; Tucker (larceny), 3 Am. St. Tr. 520; Bell (blasphemy), *Id.* 559; Maurice (Revenue law), 604; Ward (manslaughter), 4 Am. St. Tr. 854. He was born in England but graduated from Columbia College in 1804, in the same class with Alexander Hamilton, Jr., and was soon afterwards admitted to the New York Bar. From about 1816 until he was appointed United States District Attorney for New York in 1834 he was the most prominent criminal practitioner in that city. Yet none of the American or New York general Biographical Dictionaries ever mention his name, nor do any of the many publications devoted to the biographies of the legal profession. Such is the ephemeral notoriety of a member of the bar. Mr. Price was also a politician, and that politics were even hotter in those days than now is evidenced in the following extract from the diary of a political opponent, once Mayor of New York, written on the day that Mr. Price, having finished his term of office, sailed for Europe on a vacation: "William M. Price, the United States Attorney for this district, another of General Jackson's pets, and one of Mr. Van Buren's depositaries of the public money, 'in spite' (as Mr. Cambreling said) 'of the lamentations of the people,' took himself off this morning 'without beat of drum.' His flight was not known until an hour or two after the departure of the British steamer 'Liverpool,' when Wall street was in an uproar on the receipt of the intelligence that this faithful steward of the Government was a passenger. These are the men who, for political services formerly rendered (and in the case of Price continued unblushingly to the last) were appointed to the two most responsible offices in the gift of the general Government, at a time when neither of them could have got the credit upon his personal responsibility for a hundred dollars. Here are some of the fruits of the corrupt, demoralizing system which originated with this country's curse, Andrew Jackson, and has been unscrupulously carried out by the puppet who thought it 'honor enough to follow in the footsteps of his illustrious predecessor.' Price was formerly a

## THE WITNESSES FOR THE PEOPLE.

*Dr. Francis Berger.* Am a surgeon; attended Madame Pienovi one morning in the latter part of July, 1817, between six and seven; found her in much distress; the cartilage of her nose appeared to have been torn off; the end of the nose being entirely separated and gone. In about three weeks the wound was entirely healed, but her face appeared much disfigured.

violent, brawling Federalist, and when he found he could get nothing by that he became a Democrat and Tammany man, more violent and brawling louder even than he did on the other side, but with better success. He became the Marat, the Danton of the party, the Anacharsis Clootz, the orator, not of the human race, but of the profligate race whose vigils were held at Tammany Hall and the several subordinate pandemoniums of the respective wards; supporting through thick and thin the pernicious measures of his master, and denouncing all honest men who dared to doubt their infallibility. A demagogue of the first rank, he was precisely the man they wanted. They knew their Price, and he knew his, and the unsuccessful Jacobin of the Federal Party became the pampered minion of the Loco-focos."—Diary of Philip Hone, 1828-1851. Edited with Introduction by Bayard Tuckerman. New York: 1889. Vol. 1, p. 338. In a communication to the editor by an old resident of New York it is said: "There is very little to be found of history, professional or otherwise, of Price. He was killed in a duel by a great dandy, a brother of Hugh Maxwell (see 1 Am. St. Tr. 62). Maxwell figured in all the old fashion plates of old New York and especially of the elite Park Row theatrical set." But this is probably erroneous. The *New York Commercial Advertiser* of August 12, 1846, contains a notice of his death and says: "Mr. Price was a native of England, 59 years of age and was Attorney General of the United States for this district under Gen Jackson for eight years. He was a man of talents and in his day ranked among the first criminal lawyers of the country, having been engaged in nearly all the most important criminal trials of the day. He leaves a wife and large family to deplore his loss. Mr. Price committed suicide at Ottigton's Pistol Gallery, corner Canal and Elm streets, in this city, about noon, August 11, 1846." And the *Knickerbocker Magazine* contains the following appreciative reference to his death: "The sadly self-contemplated death of the late William M. Price has created a profound sensation in this community. A lawyer of eminence, widely known for so many years, not only for his rare legal endowments and especially for his distinguished eloquence, but also for the surpassing urbanity of his manners—an urbanity which sprung from the natural kindness of a warm heart—he has passed from among us, leaving behind him the grateful remembrances of all who best knew him and his eventful history. Those who have heard in past years the eloquent exordium fall in silvery tones from his lips at the

*Mr. Van Wyck* hereupon offered to read the examination of the prisoner, taken in the Police Court on the 11th of July last.

*Mr. Price* objected to the evidence on the ground that the offense laid in the indictment had not been brought home to the prisoner; and the counsel contended that the same rule ought to apply in this as in other criminal offenses: the felony must be established in the first instance before the examination can be introduced.

The MAYOR decided that the evidence was proper.

*Charles Christian.* Am a police magistrate; on the examination before me the prisoner said that he only bit off the end of his wife's nose, being jealous of her. When the prisoner was brought to the police, the charge was fully explained to him, and he was very communicative until a French gentleman came in and spoke to him in that language, when he declined answering further inquiries, and refused to sign the examination.

*Asa Holden.* In July, 1817, lived in Chambers street, and understood that Madame Pienovi put up in a house opposite, in the rear of mine, and in the next street, which was Reed, the houses being but a short distance separate. One day in the latter part of that month saw the prisoner go into the house and pass through the room in an angling direction and shortly afterwards I heard the shrieks or outcry of a woman in distress whom I saw through the window; her face ap-

pearing to me to be black with blood; almost at the same time I heard the cries, saw the prisoner distinctly through the window, who came and pulled to the window shutters. In a short time heard an outcry in the street, that a man had bit off a woman's nose and ran away.

*George B. Raymond.* Am a police officer; arrested the prisoner during the last month, who inquired of me the reason, and I informed him it was on a charge of biting off his wife's nose. Prisoner said he was apprised of the charge, admitted that he had done so, and said that any other man with the like provocation, would have done as he did. Prisoner then proceeded to relate that on the first day of the arrival of his wife in this city from the southward, at her request, he went with her to the bath in Chambers street and when they arrived there, she told him it was indecent for them to go into the bath together, and on her

Bar; who have seen him in better days the chief adornment of the social board; who have known his genius and tested his heart, while they lament his loss, will look with a lenient eye upon his surrender at last to a resistless despair. With his mental powers frozen to indifference, his heart ossified with melancholy forebodings, his soul shrouded in clouds of gloom, no consolation could break the death-like calm; no love warm the pent-up heart; no sunbeam dispel the cloud. Think of this all ye who condemn and drop a tear to the memory of one whose own heart was seldom untouched by the wants or the afflictions of his fellow-men." *Edwards' Pleasantries about Courts and Lawyers.* New York. 1867.

solicitation, he stayed without alone. After she had continued a considerable time he wanted to go in, and applied for admission to the keeper, who was a negro girl, alleging that he was

the woman's husband. The girl said that could not be, for the husband was then in the bath with her! On this ground the girl refused him admission.

### THE DEFENSE.

*Mr. Price* opened the defense to the jury, and was proceeding to state that the prisoner would prove the relation given by him to the officer substantially true; and he would further show various acts of infidelity on the part of Madame Pienovi, and that since this affair she had absconded to one of the West India Islands with her paramour.

The MAYOR interrupted the counsel, and apprised him that such testimony would not be heard by the Court, and therefore the counsel could not with propriety open it to the jury. The Court had rejected testimony of this description in the case of Hagerman, and there was less reason for its admission on this occasion, where the chastity of an absent woman was brought into question. The evidence offered could afford no justification to the offense laid in the indictment. As Raymond, however, is the witness on behalf of the prosecution, the Court think it would be regular for the defendant's counsel to inquire of him concerning any facts which may be in his knowledge relative to the infidelity of the wife.

*Mr. Price* continued his opening by stating to the jury that the prisoner would rest his defense solely on the ground of insanity.

*Peter Martin Stollenwerck.* Am proprietor of the Panorama in this city, understanding the English language very imperfectly; on the Sunday morning preceding the day in which the alleged offense was committed; prisoner left my house in a very jovial mood on being informed of the recent arrival of the wife. On the afternoon of the same day, the prisoner returned in a great

passion, and showed me a card containing the name of a Mr. Concklin, which he threw on the bureau, and alleged that he had been very much aggravated by his wife, who had deceived him. He said that she had given him that card, and told him the name thereon was that of a brave man. To pacify him I requested prisoner to go down stairs. During the evening I went into the cham-



ber of the prisoner, and found him in a state of delirium. He said he was a distressed, unfortunate man, called for water, which he drank to excess, called for more, and frequently beat his head against the wall during the night, and exhibited every other symptom of derangement.

In the morning at four o'clock he went out, alleging that the fresh air would be salutary; had been acquainted with him twelve years and observed at that time that the prisoner's manner was different from what it had been before; believe he was deranged.

At about six o'clock in the evening he returned and pushing open the door with violence, with an air of wildness, indicative of frenzy, he threw a bit of flesh or the work table; and his conduct was so much like that of a madman that I was alarmed for my own safety and took up a stick of wood for defense. Previous to this affair the character of the prisoner was good, and previous to his going out on the arrival of his wife, he ap-

peared joyful and manifested no symptoms of derangement.

*Lewis Augustus Stollenwerck.* Am nephew of the last witness, Prisoner being a painter by profession, worked for my uncle a considerable time; did his business well, and was a man of general good character. Before the affair occurred, for which he is now on trial, I thought him at times in some degree deranged; but he was at all times harmless, and I sometimes thought that this state of mind was the effect of liquor, and have often told him, jocularly, that he ought to be confined in the hospital.

On Sunday, spoken of by the last named witness, prisoner appeared composed in the morning, but in the afternoon was much agitated. This was certainly not occasioned by liquor, but by his family trouble.

*Peter Joseph,* a colored West Indian, was called as a witness to prove that Madame Pienovi, after the affray, went off to Cuba with Concklin.

The COURT said that they would never suffer the chastity of an absent woman to be impeached; and they were about to exclude the testimony, when *Mr. Price* stated, that the defendant would examine the witness merely for the purpose of accounting for the absence of the wife on the trial. The COURT. If that were the object, the witness might be examined.

*Joseph* stated that he came from St. Jago de Cuba, where he left the wife of Pienovi, who went by the name of Madame Concklin.

*Stephen Richaud.* Mr. Stollenwerck, the elder, has been an inhabitant of this city twelve years, and his general character, as a man and a christian, is unblemished.

The COURT. This testimony is unnecessary, as the good character of Mr. Stollenwerck is universally known.

*Andrew Morris.* Prisoner painted the new Roman Catholic Church, and behaved very well for a considerable time; but afterwards I observed that something was the matter with him. Having been told that the pris-

oner drank, which I never perceived him do, I made inquiry, but received no satisfactory account; thought that the prisoner was, in some measure, deranged or troubled in his mind.

*Peter Francis Roze.* Have known prisoner eight or nine years, and about a year ago last June he often appeared deranged; he was unsteady; he would begin work and then in a short time leave off; when his wife arrived from Charleston he brought her to my house and remained there with her about two hours and appeared to be elated at her arrival.

*Joseph Idley.* I confirm the testimony of Andrew Morris, in relation to the unsteadiness of the prisoner while at work at the church; the defendant at this time lived at my house; I had engaged him to do the painting; he would work a half hour and then suddenly quit, and having asked him what was the matter, was

told by him that his wife was a very bad woman.

*Lewis Wilcox.* Knew the prisoner four years and his mind appeared much disturbed, which he said was on account of his family.

*Reignard Chanefraud* Knew the prisoner seven or eight years, and at times he was disordered on account of his wife.

*Ferdinand Lenningen* Knew the prisoner ten years; he was never very consistent, and about the time of the affair his mind was weak; not deranged. The day before this he dined with his wife and appeared elated.

*John DeCarley.* Knew the prisoner before his marriage, after which he appeared deranged and his mind unsteady; saw him a few days before the affair, when he appeared to be so much in that state of mind that I did not consider it proper to question or converse with him.

*Mr. Fay* and *Mr. Price* summed up the case to the jury, and contended that the prisoner ought to be acquitted, because at the time he committed the act charged in the indictment he had not a mind capacitated for distinguishing good from evil.

*Mr. Van Wyck*, in summing up the evidence to the jury, said that the kind of insanity recognized in the law, which would excuse a man from the commission of an act, was either settled madness or lunacy during the time in which there was no lucid interval. And he pointed out to the jury the distinction between the species of madness laid down in the books as the "visitation of the Almighty," and that relied on by the defendant on this occasion. When a man, through the influence of violent passions, has been hurried into a state of temporary frenzy, and, under that excitement, commits a crime, he never can allege insanity as an excuse. The testi-

mony in the case showed clearly that at the very time of the commission of this offense he could distinguish good from evil; he acted with cunning and intelligence—he closed the windows that his wife might not be heard, and he escaped from the house. This plea of insanity was generally resorted to in desperate cases, and ought to be strictly scrutinized.

The MAYOR charged the jury, that for aught that had appeared, the character of the prisoner's wife ought to stand as unimpeached.

The point for the jury to decide was, whether, at the time the prisoner committed the outrage, he was capable of knowing good from evil. He directed the attention of the jury to two general grounds of inquiry on this subject:

1. In relation to the evidence of a general derangement, and,

2. As to the evidence of derangement at the precise time the act was committed.

1. There is no reason afforded by the testimony of Mr. Stollenwerck, the elder, or the other witnesses, who had the best opportunity of knowing the state of the prisoner's mind, that he was insane before the Sunday when his wife arrived from Charleston. The jury would here bear in mind a principle of law which is consonant with sound reason, that whatever may have been the excitement, a man should never suffer himself to be hurried into a state of temporary insanity by any of the violent passions. It is the universal language of the law—Govern your passions: for if you do not, you shall be punished. And you never shall excuse yourself for the commission of a crime by alleging a dementation arising from unruly passion.

On an examination of the testimony with a view to the first general inquiry above stated, the Court arrived at the conclusion, that the prisoner not being subject to that settled state of insanity recognized in the law as affording an excuse for the commission of an offense, in a fit of jealousy, perpetrated the outrage charged against him.

On this head the Court adverted to the testimony of Stol-

lenwerck, the elder: the jury were to believe him fully, when he stated that the prisoner was insane; but, from the whole testimony on that subject, taken in connection, they were to judge what was the species of that insanity.

1. Should the jury not be satisfied with regard to the general derangement of the prisoner, it would then be necessary to resort to the evidence with a view of ascertaining whether, at the precise time the act was committed, he was incapable of distinguishing good from evil.

Immediately upon the arrival of his wife, he was joyful, dined with her, and manifested no symptom of derangement; but in the evening he returned in a great rage, and, as Mr. Stollenwerck believed, was insane during the night. The next morning, however, he manifested some intelligence, for he said "he was going out to take a walk in the fresh air, which would be good for him." And, at this time, he went out and committed (the Court would recall the term committed, for whether he did so or not the jury must judge), one of the most shocking outrages that ever disgraced the character of a man. The extent of the offense is attempted to be palliated by the prisoner's counsel; but if committed, it admits of no palliation. When the prisoner was in the chamber of his wife at the time the deed was perpetrated, when she raised her voice in pain and agony, he went and closed the window shutters that she might not be heard. Did he do this unconscious of guilt, not knowing the difference between good and evil?

But he flies, he escapes, and he avoids the vengeance of the law for about a year, when he returned. Will a man fly after the commission of an act without a consciousness that he has done wrong?

After the lapse of a year he was arrested. At this time he said he was apprised of the charge, which he acknowledged true, and attempted to justify the deed by entering into a detail of the circumstances of provocation to the offense. He was communicative at the police, reiterated the acknowledgment of the offense, and avowed the motive; and one of the magistrates was proceeding in the examination; but the pris-

oner became silent as soon as he was spoken to by his friend in the French language.

Now the loss of memory is one of the prominent features of madness; and it is scarcely, if ever, that a person who has been reduced to the awful situation of mental derangement can bring to his remembrance facts which transpired at the time; for then the delicate texture of the brain is disordered, and the whole fabric of the mind in ruins.

The jury, therefore, from the testimony in the case relative to the conduct of the prisoner immediately before and after the offense charged against him, as well as from his subsequent conduct and declarations, will determine whether at the precise point of time in which the act was perpetrated he was capacitated for distinguishing good from evil.

As had been very justly observed by the counsel for the prosecution, insanity was a defense frequently resorted to when every other ground of defense had failed; and it was a correct rule that whenever this defense was relied on by a prisoner he ought to bring ample testimony to leave not the shadow of a doubt in the mind of the jury.

#### THE VERDICT AND SENTENCE.

The *Jury* found the prisoner *Guilty*, but recommended him to mercy.

The MAYOR said that he was unable to see the reason of that recommendation: for surely none was afforded by the evidence. After a most impressive address to the prisoner on the shocking deed of which he had been convicted, wherein his Honor said that a crime of this precise description had never before, he might venture to say, been perpetrated in the United States, and he trusted in God never might be committed by any of its citizens, the prisoner was sentenced to the penitentiary two years.

## THE TRIAL OF ANN K. SIMPSON FOR THE MURDER OF ALEXANDER C. SIMPSON, FAYETTEVILLE, NORTH CAROLINA, 1850.

### THE NARRATIVE.

A beautiful young woman in a North Carolina town married a rich old man, and then began regretting the poor young gentlemen she had been in love with. She consulted a fortune teller who told her that the ancient would soon die and then she would be free. To expedite matters (as the State claimed) she bought a package of arsenic at a drug store, ostensibly to kill rats, but actually to put in her husband's coffee, and in a "syllabub" of which he was very fond. He died in great agony from the effects of the arsenic, so the physicians said.

On her trial for murder, the counsel for the woman offered no evidence, not even a single expert appeared to contradict the physicians and chemists who appeared for the State and who all agreed that it was arsenic that killed the old man. But her lawyers were eloquent and astute; they implored the country jury not to put the cruel rope around such a beautiful neck, when the evidence was all circumstantial, and they read from a score of medical works to the effect that the poison tests which the physicians had applied are not always to be relied on. The jurors, unable to distinguish between the evidence and the argument, and with all their southern sympathies on the side of female beauty, did as her lawyers expected they would—they acquitted the woman.

### THE TRIAL.<sup>1</sup>

*In the Supreme Court of Cumberland County (Fayetteville), North Carolina, November, 1850.*

HON. WILLIAM H. BATTLE,<sup>2</sup> Judge.

<sup>1</sup> *Bibliography.* "The trial of Mrs. Ann K. Simpson, charged with the murder of her husband, Alexander C. Simpson, by poisoning

Nov. 14.

An indictment had been previously found by the Grand Jury charging the prisoner, Ann K. Simpson with the murder of her husband by poisoning. Being arraigned today she pleaded *not guilty*.<sup>3</sup> From a very large panel which had been summoned the following jurors were selected: Daniel Clark, William Butler, Archibald McGregor, John B. Wright, John Thames, Charles S. Johnson, John T. Wright, Murdock McKinnon, James W. McAlister, John A. Williams, James Price, Daniel Cameron.

Mr. Solicitor *Ashe*<sup>4</sup> and *James C. Dobbin*<sup>5</sup> for the State; *Robert Strange*,<sup>6</sup> *Warren Winslow*,<sup>7</sup> *Duncan K. McRae*<sup>8</sup> and *John Winslow* for the Prisoner.

with arsenic. Before His Honor, Judge William H. Battle, at the fall term of the Supreme Court of Law for the County of Cumberland, holden at Fayetteville, North Carolina, on Thursday and Friday, Nov. 14th and 15th, A. D., 1850, reported by William H. Haigh, of the Fayetteville Bar, Fayetteville, N. C. Published by Edward J. Hale & Son, New York, A. S. Barnes & Company, 1851."

<sup>2</sup> BATTLE, WILLIAM HORN. (1802-1879.) Born Edgecombe County, N. C. Graduated University of North Carolina. Reporter Supreme Court decisions. Delegate to national convention that nominated William Henry Harrison for the presidency, 1839. Judge Superior Court North Carolina, 1840-1852. Judge Supreme Court, 1852-1868. Author of several works on the Common and Statute Law of North Carolina.

<sup>3</sup> After a warrant had been issued for her arrest in November, 1849, Mrs. Simpson fled to Charleston, and from there to Havana, where she remained until May, 1850. She returned to Fayetteville on Nov. 7, 1850, and surrendered herself to the authorities.

<sup>4</sup> ASHE, THOMAS SAMUEL. (1810-1887.) Born Orange County, N. C. Member State Legislature, North Carolina, 1842. Solicitor Fifth Judicial District, 1847-1853. State Senator, 1854. Member House of Representatives, Confederate States, 1861. Senator Confederate States, 1864. Councillor of State, 1866. Member House of Representatives, United States, 1873-1877. Judge Supreme Court, North Carolina, 1878-1887.

<sup>5</sup> DOBBIN, JAMES COCHRANE. (1814-1857). Born Fayetteville, N. C. Member United States House of Representatives, 1845. Member State Legislature, (N. C.) 1848-1850. Speaker, 1850. Presidential elector, 1852. Secretary of the Navy, 1853-1857.

<sup>6</sup> STRANGE, ROBERT. (1796-1854.) Born Virginia. Member of State Legislature, (N. C.) for several terms. Judge Supreme Court North Carolina, 1826-1838. United States Senator, 1835-1841. Soli-



## THE WITNESSES FOR THE PROSECUTION.

*Dr. W. P. Mallett.* Was acquainted with Alexander C. Simpson; saw him last on the 8th day of November, 1849. He died between eight and ten that evening; was called to see him about ten Thursday morning; found him in bed, quite sick. He said he had been sick the whole night previous, suffering from burning pain in the stomach. He vomited mucus tinged with bile. His pulse was very feeble, and he complained of thirst; prescribed for him and left him; visited him again in the afternoon; he was worse. He, or his wife, the prisoner, told me that he had had diarrhoea, and that his evacuations were dark; prescribed for him again. My first prescription consisted of two pills; each containing five grains of calomel and one-quarter grain of opium; gave these pills to the servant to take to him; directed a poultice to be placed over his stomach and one

of the pills to be taken when the nausea was relieved; on my second visit prescribed morphine; after tea a boy came to me in great haste and told me that Mr. Simpson was very ill; found him, as I thought, dying; found Dr. Robinson there in the act of making a prescription of morphine. Mr. Simpson continued to complain of the burning sensation in his stomach and seemed to be sinking, but he died about one hour afterwards. His symptoms were, great pain, with a burning sensation in the pit of his stomach; an anxious countenance, evidencing great distress; extreme thirst and feeble pulse.

There was a *post-mortem* examination commenced on Saturday morning. On Friday afternoon was summoned to a jury of inquest to be held on Saturday morning at nine. We made the examination. First the lungs: found nothing peculiar. Next,

citor Fifth Judicial Circuit, N. C. Author of the novel "E-one-guski, or The Cherokee Chief."

<sup>7</sup> WINSLOW, WARREN. (1810-1862.) Born Fayetteville, N. C. Member Senate, North Carolina, 1854, and Speaker. Governor of State, 1855-1861.

<sup>8</sup> McRAE, DUNCAN KIRKLAND. Born Fayetteville, N. C., 1820. Educated at University of Virginia and William and Mary. Studied law with Judge Strange. Member General Assembly N. C. 1842. Defeated for Governor 1848. Appointed United States Consul to Paris by President Pierce. Colonel of 5th North Carolina Infantry in Civil War. "It was the regiment of Duncan K. McRea, of D. H. Hill's Division, that extorted from the generous and gallant Hancock that memorable declaration: 'The Fifth North Carolina and Twenty-fourth Virginia deserve to have the word immortal inscribed on their banners.' Peeler's Lives of Distinguished North Carolinians. After the war he moved to Memphis, Tenn., then to Chicago, and later returned to North Carolina, residing at Wilmington. (See Wheeler Reminiscences of North Carolina: U. S. Office: Record, War of the Rebellion.)"

the heart: found it in its natural position with a slight appearance of disease. Next, the liver: on superficial examination it appeared healthy; we did not remove it. The stomach presented the blush of inflammation, extending to the small intestines. We removed the stomach and as much of the small intestines as presented the appearance of inflammation; put them into a jar and carried them to Dr. Robinson's shop, where they were subjected to further superficial examination, and the appearance of inflammation extended throughout. The stomach was opened, and found to contain about one quart of fluid and semi fluid; it had a dark brown bloody appearance. This we placed in a clean basin; examined the mucous membrane; found it greatly inflamed. There were one or two points of ulceration or erosion. The ulceration might have existed a longer time, but the erosions were of brief formation; discovered on the internal surface of the stomach white particles, varying in size from the head of a pin to three times that size; subjected the fluid contents to chemical tests. A portion of the fluid contents were placed in an evaporating dish, over the fire, and evaporated. The residuum presented the appearance of soft cheese. A portion of that was boiled in distilled water, in a Florence flask, for half an hour, and filtered. This was subjected to the liquid tests, Reinsch's tests and the reduction tests. First, liquid tests. One of the tests consists of a solution of nitrate of silver in distilled water with ammonia, making the ammonical nitrate of silver. A part of the

fluid obtained by boiling with distilled water the residuum of the fluid contents of the stomach was placed in a vial to which was added the nitrate of silver test, producing a yellow precipitate—forming the arsenite of silver. That test did not convince us that there was arsenic in the stomach. The next test was a solution of sulphate of copper in distilled water. To this ammonia was added, making the ammonical sulphate of copper. A portion of this was added to the suspected fluid—producing an apple-green precipitate—the arsenite of copper. We then made a solution of what we knew to be arsenic, by adding arsenic to distilled water. And applied the same liquid tests to that solution. First, ammonical nitrate of silver applied to it, gave a yellow precipitate. Second, solution of sulphate of copper made the same precipitate that was formed from the suspected fluid with the solution of the sulphate of copper. Another portion of the suspected fluid was placed in a test tube, and into that a few slips of bright copper were placed, and heated. The copper had a metallic coating, became tarnished, and of a steel color. Also, other pieces of copper placed in what we knew to be a solution of arsenic produced the same results. This test is called Reinsch's test. These tests were repeated. Another test, the reduction, by taking the green precipitate formed by adding the sulphate copper to the suspected fluid to which was added charcoal which was placed in a tube and heated. This produced a crystalline appearance, coating the tube with a ring of a steel-gray color; was satisfied from the ring its ap-

pearance corresponding with the description of the metallic ring mentioned in the books; came to the conclusion, from the application of tests, from the appearance of the stomach, and by recurring to the symptoms exhibited before death, that Alexander C. Simpson came to his death by arsenic.

When the symptoms appeared I did not suspect arsenic; but further examination has confirmed me that there was arsenic and that the death of the deceased was occasioned by it.

When I visited Mr. Simpson on 8th November, 1849, Mrs. Simpson placed her hand upon his head, which he immediately removed to one side. She remarked: "Touch me not." "You are a touch-me-not." He did not reply. The odor of arsenic is compared to that of garlic. Arsenic prevents putrefaction. No putrefaction in Simpson's body, and a want of the smell usual in dead bodies.

To *Mr. Warren Winslow*. On reaching my office about ten, I found a note from Mrs. Simpson, asking me to visit her husband; did not regard him ill at that time. He informed me that he had been sick all night, vomiting with great thirst and pain in the stomach; prescribed ten grains of calomel, one-half grain of opium in two pills; made the pills myself, and gave them to the boy; visited him again in the afternoon; understood that diarrhoea had supervened; observed no blood in what passed from him. I think that Mrs. Simpson was present when I had conversation with Mr. Simpson. There was not exceeding one grain of opium in the dose of the solution

of morphine used by me. The same boy came for me after tea; found Dr. Robinson there; considered him then ill; burning pain in the stomach, thirst, sinking sensations, and I could perceive no pulse. He was sensible and so continued till he died. He had no delirium; died with his head on my arm; wished an examination of the body for my own satisfaction. When I communicated this to Mrs. Simpson, and told her that a *post-mortem* examination should be made, she exhibited no more, nor less repugnance, than I should have expected from any wife. She inquired why it should be made? Replied that it was for my own satisfaction. She replied that if Dr. Robinson and I desired it, and regarded it as important, she would interpose no objection. We thought the heart at first diseased, and on this account removed it. It was found to be sound. We found the left lung collapsed, and the right lung adherent. The stomach we removed to Dr. Robinson's shop; it was inflamed; administered a solution of iodine to Mr. Simpson in April or May; never thought him suffering under any disorder that required mercury.

To *Mr. Ashe*. Directed Mr. Simpson in April or May to take a teaspoonful of a solution of iodine daily. Two teaspoonfuls of the solution iodine taken just before his death might have produced inflammation; but could not have produced the results shown by the examination, or by the tests; have given the same solution of iodine to others, but never knew it to injure; so as to the calomel; did not see the evacuations, but heard they were dark; did not hear that there was

blood. Dr. Robinson, Dr. James A. McRae, Dr. Gilliam (a part of the time) and Dr. Colton (the latter part of the time) were present when the tests were applied. Dr. Samuel J. Hinsdale has, during the past week, applied tests to the same substance.

*Dr. Benjamin W. Robinson.* Saw Alexander C. Simpson last on Thursday night, 8th November between seven and eight. He died within an hour after I entered; found him with cold skin, pulseless, with a countenance exhibiting great distress and anxiety, complaining of intense pain at the pit of the stomach. His breathing was a little hurried, and he complained of a sinking feeling. These symptoms continued till death; was present at the *post-mortem* on the forenoon of Saturday. Drs. Mallett, Gilliam and McRae were present. The chest and abdomen were laid open. We found the right lung adherent to the lining membrane of the chest, the left lung collapsed. The heart was removed, and afterwards examined. There was no evidence of disease in that organ. The stomach and a portion of the smaller intestines presented decided evidences of inflammation. No external evidence of disease of the liver, and it was not removed. The larger intestines were pale and unusually contracted, and the bladder was remarkably contracted. From thirty to forty inches of the intestines were diseased. A ligature was tied above the upper orifice of the stomach, and another at a point on the intestinal tube where the external marks of disease ceased. The parts included between these ligatures were removed. The stomach, etc.,

were taken to my office. Some hours after the removal, we opened and examined and found a high state of inflammation in the lining coats of the stomach and intestines. Patches of erosions were discovered where the inner coat of the stomach was eaten through. There were at several points specks of whitish matter adhering to the stomach in the form of whitish paste.

The contents of the stomach were received in a clean vessel, and a portion of the fluid contents evaporated. A portion of the residuum (of evaporation) was put into a clean Florence flask with distilled water and boiled for half an hour, then filtered. To a portion of that filtered solution we applied one of the liquid tests, viz. the ammonia nitrate of silver, which resulted in a light yellow precipitate, changing afterwards to a dirty brown. To another portion we applied the ammonia sulphate of copper test, and the precipitate was of a green color, apple-green. With another portion, after adding a few drops of hydrochloric (muriatic) acid a few pieces of bright copper were boiled, resulting in an iron-gray coating on the copper. (Reinsch's test.)

To a solution of known arsenic the same tests were applied, producing similar results. The arsenic was subjected to all the tests and found to be pure.

Some of the white particles found in the stomach were subjected to a blow-pipe heat and evolved the garlic odor, which is indicative of arsenic. Rev. Dr. Colton took some of the suspected fluid, and the next day subjected it to tests in our presence. The suspected fluid was by him

treated with the two liquid tests already named, producing precisely similar results. Water charged with sulphureted hydrogen gas, added to a portion of the suspected fluid, caused immediately a decided yellow color, which resulted after some hours in a sulphur-yellow precipitate. A portion of the precipitate derived from the ammonia sulphate of copper test with suspected fluid, was put into a tube with a flux composed of carbon, potash and charcoal, and strong heat applied, a ring of iron-gray color formed near the neck of the tube and crystals, numerous and unequivocal were condensed on the cooler portion of the tube. Arsenic, with the same kind of flux, was subjected in a small retort to the same experiments. Metallic ring and crystals, agreeing precisely in appearance with the former resulted. Some of the same precipitate (from ammonia sulph. copper test), put into a platino spoon with charcoal, under a blow-pipe heat. Decided garlic odor exhaled. Garlic odor evolved from the white particles taken from the stomach when treated in the same way. As to the character of the ring formed on the tube in which the green precipitate was placed as before stated; was satisfied that it was the characteristic arsenical ring.

Some of the white substance taken from the stomach (which had been received on bibulous paper) put into a test tube with dried carb. potash and charcoal, subjected to heat of a spirit lamp—a well-marked ring of an iron or steel-gray color, and metallic lustre was produced. That portion of the tube on which the crust or ring formed, was cut off

by a file and placed in a large test tube—heat again applied and crystals in some abundance condensed on cooler portions of the tube. Into this tube distilled water was poured and boiled till the crystals were dissolved. To one portion of this the ammonia sulph. copper test was added, and produced an immediate precipitate of greenish color, apple-green. To another portion ammonia nitrate silver test was added—producing a light-yellow precipitate which changed to a brownish color. Into another portion, sulphureted hydrogen gas was introduced, causing immediately a sulphur-yellow color—no precipitate then falling, but produced afterwards by heating and acidulation; am satisfied that the ring was the metallic ring, the color was iron or steel-gray, corresponding with what we know to be the true arsenical ring, produced by experiments with known arsenious acid; think that all these facts show that the same result might have been produced from arsenic taken by Mr. Simpson the day before his death. I entertain no doubt but that there was arsenic in his stomach. The symptoms described by Dr. Mallett are such as might have been caused by an irritant poison. Calomel could not have produced the same results, nor iodine. From the symptoms, from the morbid appearance, and from the results of the application of the chemical tests, no other discoverable cause of death existing, I am forced to the conclusion that Simpson came to his death by arsenic. Persons may die from arsenic, and yet upon a *post-mortem* examination no arsenic may be found. The experience and

observation of others leads me to make this remark. Think there was a sufficient quantity of arsenic in the body to give rise to the observed effects. Three to four grains of arsenic writers say, will produce death, more or less speedily, according to the constitution, or according to peculiar circumstances.

To *Mr. Warren Winslow*. Between seven and eight o'clock a message conveyed to me by Mr. Whitfield induced me to visit Mr. Simpson; found him in a dying state. The remedies used were simply to revive and sustain his strength. Mrs. Simpson was in the room when I got there; think there were others there; had no conversation with Mrs. Simpson on the subject of a *post-mortem* examination. From the symptoms alone of Mr. Simpson's sickness would not say as a physician, that Mr. Simpson died by arsenic; was called to Mr. Robert Massey's some days after Mr. Simpson's death. He had vomiting, purging, pain in the stomach, but his evacuations were not dark. The symptoms were not so severe. Some of the contents of the stomach or bowels from the Massey's were sent to my office and tests applied, but no arsenic was discovered. Robert Massey was the only one of the family that I professionally attended. It might have been poison; have stated that there might be some cases where arsenic had been taken, when, upon a *post-mortem*, no arsenic could be found; do not wish to be so understood when the tests are applied; have authority for stating that the 300th part of a grain may be detected by the tests;

have heard or seen it stated that the 10,000th part of a grain may be detected, but do not recollect the authority. In Reinsch's test no fully satisfactory result was obtained, either from the suspected or known solution. Christison and Oefla are amongst the best authors on toxicology; know Mr. John K. Mitchell, of Philadelphia, only by reputation. He stands high as a physician. He is not Professor of Chemistry in the Jefferson College, but Professor of Practice of Medicine. Dr. Bache is Professor of Chemistry; am not aware that Dr. Mitchell is eminent as a chemist, though he may be. Oefla stands as high among the French as Christison among the English on toxicology.

To *Mr. Ashe*. Beck is a high authority on medical jurisprudence. Oefla admitted, as late as 1840 or '41, that the opinion he had entertained in regard to arsenic in the human system was a fallacy. Professor Silliman and Turner are eminent chemists. Though from the symptoms alone would not say there was arsenic; yet from the symptoms, appearances and experiments, have no doubt but that Simpson died from arsenic.

In Massey's case I stated there might probably have been poison; probably vegetable or animal; did not then believe, nor do I now believe, that there was arsenic in the stomach; have been a practicing physician for 15 or 16 years; studied chemistry in my father's office, subsequently attended lectures on that branch in Charleston, and afterwards in Philadelphia, where it was a part of the course of professional tuition.



*Rev. Doctor Colton.* Was educated at Yale; attended Prof. Silliman's lectures for two years. Very soon thereafter turned my attention to chemistry in Munsden. Afterwards I lived in town of Amherst, where I had a laboratory and delivered lectures. Afterwards lived in Fayetteville, N. C., where, as principal of the Donaldson Academy, had a

laboratory, and lectured to a large class of students.

With the body of Mr. Simpson I had nothing to do, nor can I speak of its appearance after death. The identity of the parts upon which I experimented must depend upon the evidence of the physicians who had them in charge.

*Mr. Colton* then read from manuscript, by the consent of the counsel, the following, as the result of these experiments.

On Monday morning, Nov. 12, 1849, I went to Fayetteville on the invitation of several gentlemen, to assist in examining the stomach and contents of the stomach and intestines of a Mr. Simpson, suspected to contain some poisonous ingredient.

There were presented to me the stomach and a portion of the intestines, said to have been taken from the body of Mr. Simpson. Some portion of these, with their contents, were said to have been subjected to boiling in pure or distilled water. The liquor had been filtered, and was ready for examination. The stomach and intestines were of a deep red color, but gave forth no unpleasant odor, as I could perceive. I do not say, however, that there was no smell, for by some means my olfactory nerves have lost so much of their action that unless the odor be pungent, I do not perceive it.

As there are several salts that are antiseptic, the absence of odor might indicate that some preparation had been applied before or after death. Whether any had been used after the intestines had been taken from the body, they that had charge of them can testify.

I then proceeded to the examination of the liquor obtained from the boiling, as above specified. The certainty that this liquor was obtained, as I have named, rests upon the testimony of those who had charge of the business.

I remarked to the gentlemen concerned in the examination, that the only ground of absolute certainty was the reduction of the oxide of arsenic, if found, to its metallic state, and that all other tests amounted only to a probability, more or less strong, as the tests were more or less distinct, and as correlative tests coincided with each other.

I then stated that we would proceed to make as great a variety of experiments as our means would allow; instituting correlative experiments, viz., making compounds of materials of known characters of the same kind with those suspected to be contained in the liquor, and then comparing similar quantities of the suspected liquor under like treatment with these.

Ex. 1. Accordingly I mixed one grain of known oxide of arsenic with three grains of carbonate of potash, in two drachms of distilled water.

In another vessel I dissolved two grains of the sulphate of copper



in the same kind of water; these two I mixed and the result was, a color not quite grass-green, but having a bluish tinge.

I then took two drachms of the suspected liquor, after filtering, dissolved it in three grains of carbonate of potash. In another two drachms of the same liquor I dissolved two grains of sulphate of copper, and on mixing the two, there appeared a beautiful grass-green; such as Scheele's green, or arsenite of copper exhibits.

Ex. 2. I then dissolved two grains of the oxide of arsenic in two drachms of distilled water. In another glass poured in the suspected liquor. Into each of these I poured some sulphureted hydrogen water—the result was in the first glass a brownish color, with a tinge of yellow. This peculiarity of the brown color, I suppose, arose from the excess of the acid. In the other glass, containing the suspected liquor, the result was a bright but pale yellow, indicating the existence of orpiment—a paint known to contain arsenic.

Ex. 3. Next, I took some of the supposed mineral taken from the stomach which had been dried on a filtering paper, mixed it with charcoal as a flux. Subjected it to heat in a platinum cup, with a blow-pipe, and a smell of garlic was the result, which always happens when burning the oxide of arsenic.

Ex. 4. Next I filtered some of the matter that I had prepared in experiment No. 1, and dried the filtered mass in order to subject it to the action of heat with a flux. This was then compared by trial with some pulverized charcoal, and subjected to the action of a spirit lamp. In a short time white fumes arose, and were sublimed in the neck of the retort, in fine delicate crystals, giving forth at the same time the garlic smell. I then put some of the dried filtered mass into a small retort, with charcoal, and subjected it to heat, and there were formed in the neck of the retort, the same kind of crystals, of the same color, and with the same smell. These correlative experiments, producing coinciding results, I regard as furnishing conclusive evidence of the existence of arsenic, or more properly, the oxide of arsenic in the liquor said to have been obtained by a decoction of a portion of the stomach and intestines which were said to have been taken from the body of Mr. Simpson.

A reduction of the metal itself from the same filtered mass would have rendered the evidence somewhat stronger, as then there could have been no possible doubt. I however consider the evidence conclusive as derived from the experiments made.

1. From the similarity of smell, as found in the known and suspected article, which smell is peculiar to this oxide, and can easily be distinguished by an experienced chemist from that proceeding from the burning of any other substance.

2. From the similarity of color produced by mixing the liquor containing the known oxide, and the suspected liquor, with the sulphate of copper producing arsenic of copper—green color.

3. From the similarity in appearance of the results of the sublimation of the known article, and that of the suspected.

4. From the similarity of the smell and appearance of the known

article, when heated with charcoal, and that which had been gained from the filtered and dried mass.

5. From the color obtained in mixing the suspected liquor with sulphureted hydrogen.

Based upon these arguments, I am fully convinced that in the liquor presented to me for examination a portion of the oxide, or as it is otherwise called arsenious acid was present. In what quantity I am not able to say. But of the presence of the article I have no doubt. The reason why I did not proceed with the reduction of the oxide to its metallic state, is, that I had not and could not procure, the competent apparatus. As I have spoken of the oxide of arsenic, and arsenious acid it is proper that I should state that I refer to the same article. It is, strictly speaking, an oxide, its equivalent number being 38 of the metal, and 16 of oxygen, making the compound 54. It has also acid properties, and is therefore denominated arsenious acid.

The physicians who had charge of the materials, and who were with me in conducting the experiments were Messrs. Benjamin W. Robinson, William P. Mallett, James L. Gilliam, James A. McRae and a part of the time Dr. A. F. Mallett.

The experiments I made were all my own, independent of all other experiments that were made.

*Mr. Dobbin.* Will you be good enough to state whether calomel or tartar emetic, or the solution of iodine, would not produce similar results, as have been described by the physicians in this case? They would not.

*James M. Smith.* In 1849 was living in the town of Fayetteville as a clerk in the store of Samuel J. Hinsdale, a druggist and chemist. About a week before Mr. Simpson died, sold one ounce of arsenic to Mrs. Simpson 3d November, 1849. She called for arsenic and I gave it to her; knew it to be arsenic from the label on the bottle. I have sold the same arsenic—both before and since, and never heard that it was not pure.

To *Mr. Strange.* Mr. Simpson had an account at our store; never sold him chrome yellow. He bought a good many things there. We have chrome yellow for sale. It is a paint frequently made use of in carriage manufactories. I sometimes draw off the accounts—but Mr. Hinsdale

drew off the account for the administrator of Alexander C. Simpson; will not say that I never sold Mr. Simpson tartar emetic. No one was with Mrs. Simpson when she came in; don't recollect whether she asked for ratsbane.

*Nancy Register.* Was acquainted with Mr. and Mrs. Simpson. I stayed at their house for some time as a seamstress. About one month before she read me a letter, she said she had found upon the table from him. She locked the door and taking a seat, read me the letter; do not recollect all that it contained; think he said in it, "And I once thought you loved me, but now I have reasons to suspect that you love another better than me. For the sake of your friends you

may stay in my house, but you must find your own clothes as well as you can. Prepare a bed upstairs for me tonight, you can no longer be my wife."

She said she did not know whether to let him know that she had received the note or prepare him a bed. She said he need not turn a fool now, as the gentleman to whom he refers, has been visiting the house ever since we were married; told her she had better act differently to what she had done as Mr. Simpson might kill the man who was visiting her. She said he knew better than to do that; next morning on my return to the house, she said she would meet him, and kiss him. I saw her meet him and he put his hand upon her shoulders. Next day she was packing up to leave him. She said her husband had been put out with her from reports that a fortune teller had told her, that she and Mr. Simpson would not live together but five years and three of them were gone, and she believed it now. She said she was going to leave him, but he did not give her a chance to get away, so she only went to her brother's. Mrs. Rising was there. She was a lady that was said to tell fortunes—and was sent for by Mrs. Simpson; often heard her say that she loved somebody else better than her husband; said she loved him and was engaged to be married to him before she married Mr. Simpson, but her friends prevented them from being married and that was the reason she loved him now; that she never loved Mr. Simpson, but married him to get a home. She mentioned the name of the gentleman she was fond of.

Mr. McRae declined the cross-examination of the witness.

*Rachel Arey.* Was acquainted with Mr. and Mrs. Simpson. On the night he died I was sent for, and when I went over no person was in the room with him but Mrs. Simpson. He turned to me as if in great agony and asked me to do something for him, that he was going to die; asked me to pray for him. I told him that I could not, he must pray for himself. He turned over and said, "Lord, Jesus, have mercy upon me." After his death Mrs. Simpson and I went upstairs. She told me that what the fortune teller, Mrs. Rising, had told her, had come true. That Mrs. Rising had told her fortune some months before, and said, that she was to live with Mr. Simpson but a few months; said she had purchased some sugar and coffee for Mrs. Rising and on going there Mrs. Rising told her that she was to live with her husband but one week and that she would marry again, her first love.

To *Mr. Strange.* She did not seem to be affected when she told me what Mrs. Rising had said; do not remember that Mrs. Simpson was told by her husband that he was dying, and that he asked her not to leave him; have not always been on friendly terms with Mrs. Simpson; some few words passed between us some good while ago. There were three servants at Mr. Simpson's. One belonging to Mrs. Butler, one to Mr. McPherson and one to Mrs. Warden. One of the servants was a boy named Charles.

To *Mr. Dobbin.* Mrs. Simpson seemed to grieve when in the room with her husband, but when upstairs, after his death, she told

me that Mrs. Rising had told her fortune, and that she would marry another after his death, who had courted and loved her before she married Mr. Simpson. There was not a tear in her eyes.

*Samuel G. Smith.* Lived with Alexander C. Simpson; boarded at his house when he died; had a conversation with Mrs. Simpson on Thursday at dinner. No one but Mr. Whitfield, herself and I were present. She asked me what effect arsenic would have upon things; told her it was fatal and that there were two kinds. She said she had bought some to kill rats, but that she was afraid it would get in the victuals, and had therefore thrown it away in the sand; I described the effects of red and white arsenic upon rats. In October, 1848, till the Monday before he died, I had lodged in his house. He was taken sick on Wednesday night. On Thursday morning, at breakfast time he was in bed. He said he had been very sick, that he had been vomiting all night, and complained of a burning pain in the stomach. At dinner on Wednesday at one o'clock, our usual dinner hour, Mr. Simpson, Mr. Whitfield and myself went into the dining room. Mrs. Simpson came in from the pantry, having in her hand two glasses of syllabub. She apologized to Mr. Whitfield and myself, we being sons of temperance, that she had made only two glasses, one for herself and one for Mr. Simpson. She placed one of the glasses at her own plate and the other at Mr. Simpson's. After Mr. Simpson ate his he asked for more. She told him that she did not want hers, and gave it to him, which he ate. At tea I was

listening to Mr. Whitfield and Mr. Simpson, who were talking. Mrs. Simpson handed me a cup of coffee, which I set down by my plate and commenced stirring with a spoon. Mrs. Simpson called out to me in a loud voice: "Mr. Smith, I said that was Mr. Simpson's coffee." Suppose she had spoken to me before, as she said this in a positive excited manner; passed the cup to Mr. Simpson. When he finished drinking it, she asked him if he would take another cup. He said "No, he felt sick at the stomach and did not feel like drinking any more." Left soon after and did not see him any more till the next morning, when he appeared very sick, and told me that he had been sick all night vomiting with burning pain in the stomach. At breakfast time I told him to send for a physician. He said he would do so; at dinner time Mrs. Simpson asked me to go and see Mr. S.; found him suffering with a sick stomach. He said the doctor had sent him a prescription, but he had not taken it, he felt too sick to do it. Mrs. Simpson said she had "been trying" to make him take it. Mrs. Simpson went out, and on returning brought back a spoon with syrup and a pill or something different from the syrup in it, which she beat up in the spoon. She gave it to him, and very soon he vomited. She remarked that he had not thrown the pill up, and seemed much gratified. Mrs. Simpson sent word to us that she could not come in, as the doctor was there, and Mr. Simpson was very sick. After supper she asked me to go and see him. She said he was scared, begging the doctor like a child to come back

and see him. He seemed to be in great misery and asked me to do something for him; asked Mrs. Simpson if she could not do anything for him. She said, no, but that she would do all that she could, and went out and got a poultice, and placed it on his stomach. He complained that it burnt him very much. She then placed a linen cloth underneath the poultice, and very soon he seemed relieved. Mrs. Simpson alluded to his and her fortunes repeatedly at table. On various occasions after tea, she would take the coffee cups and then turn them about in her hands and said she saw his fortune. On Wednesday evening she took the cups and commenced telling his fortune. She said that he was going to be sick. I see, said she, a sick bed, a coffin and a dark and muddy road with clouds around. She then went on to say that she once had her fortune told—that she was to marry Mr. Simpson, they were to have three children, two of them were to die, the third would live and then he would die. Asked her to tell my fortune. She did so in the same way that she had told Mr. Simpson's, by looking in the cups. She said my fortune was that I should go and see a young lady shortly. Immediately after telling me this, she again turned the cups in her hand, looked in them and repeated that Mr. Simpson was going to be sick.

To *Mr. Warren Winslow*. Commenced boarding with deceased in November, 1847, and continued there till his death; was in his employ. On the Wednesday that she prepared the syllabubs, she said she had forgotten that Mr. Whitfield and I did not eat

syllabubs. We were sons of temperance. The rules of the order proscribe syllabub; do not know why; have heard debates upon it, in the meetings of the order. I heard no reasons assigned for the proscription. Custard is not proscribed. I ate a syllabub once, but that was seasoned with lemon. Perhaps it is on account of the wine in the syllabub; believe now that is the reason. Mr. Simpson ate his, and asked for more. She said there was no more finished, but offered hers. He took her glass and ate it with a spoon, a silver spoon, I think; saw him that evening about twilight, on the opposite side of the street from me, walking; do not know that he complained of being sick that afternoon. I met him again at tea. When the first cup of coffee was passed to me, then it was that she said in an animated tone: "Mr. Smith, I said that is Mr. Simpson's coffee." Presumed she must have spoken to me before, and that I did not hear her. There was no suspicion then in regard to that cup of coffee upon my mind. Mr. Simpson drank his coffee stronger and sweeter than I did. Frequent mistakes had occurred, and with a view to prevent their repetition, commonly two coffee pots were used. I was served out of one, and he ordinarily from the other. The arrangement was that I should take the first cup. The arrangement was made some weeks before, and I do not remember any mistake having been made in the intermediate time. There was but one coffee pot used that evening. At early bedtime on Wednesday night, he was taken sick, as I was informed by him afterwards. On Thursday morning

went into his room by request of Mrs. Simpson; did not think him much sick. It was at dinner that day the conversation occurred about the effects of arsenic on rats; told her that red arsenic made the rats run to the fire, and that white arsenic makes them take to the water. I do not know anything of rats being in that house; am not clear whether I ever heard of rats in the house from Mrs. Simpson, unless during that conversation she may have said that the rats were bad. I think, now, she did. After dinner I went again to see him, possibly by Mrs. Simpson's invitation; have seen calomel frequently given in a spoon with syrup. She gave it in the ordinary way. What she gave him was a pill of a brown color. He vomited soon after. He appeared to be relieved by the vomiting; did not see whether he threw up the pill; heard her say she was glad he had not thrown up the pill. After tea Mrs. Simpson invited me in again. It was then that Mrs. Simpson told me that Mr. Simpson was scared; left him about fifteen minutes after, and returned in about one hour and a half; during that visit he died. Mr. Simpson had taken medicine at the shop; he had a vial of medicine there; he took cherry bitters. At the time of his death there was a vial and spoon there; I gave them to Drs. Robinson and Mallett. Mr. and Mrs. Simpson were very affectionate. She always used some expression of endearment to him. When telling his fortune she said: "You know, lovey, I had my fortune told once; I was to marry you, have two children and both were to die. I was to have a third and it

was to live, and then you were to die." While she was telling him that he must die, he neither looked sad nor jocose. When my fortune was told I took it jocularly.

The vial shown is like the one Mr. Simpson had; it was about as full when I saw it as it is now.

To *Mr. Strange*. Mr. Simpson was in delicate health; do not know that he had chills, nor what was the matter with him; nor do I know that on account of his health, Mrs. Simpson ever prepared little knick-knacks for him. He suffered from eruptions on his body, which I thought a scrofulous disorder.

To *Mr. Ashe*. Did not know Mrs. Rising, the fortune teller; the report is that she is dead.

*Alexander Johnson*. Am Sheriff of Cumberland; recollect hearing of the death of Alexander C. Simpson; attempted to arrest Mrs. Simpson, but was unable to find her. Her husband's residence was in town where they lived till his death; was sent for to go to the Lafayette Hotel on Friday last, when I got there Mrs. Simpson was there and surrendered herself; this was the first time that I had seen her since November, 1849.

*Mrs. Ann Butler*. Have been living in Fayetteville for the last eight years; lived next door to Polly Rising and knew her well; have seen Mrs. Simpson go there once or twice a day; was present at a conversation between Mrs. Simpson and Polly Rising, who was a fortune teller; saw Mrs. Simpson take cups in her hand and Polly Rising would look into them and pretend to tell her fortune. Mrs. Simpson came there one morning and stated that Mr.



Simpson had struck her a blow the evening previous. Mrs. Rising said she pitied her very much and told her not to mind it, that Mr. Simpson would not be living that night, if she would do as she told her to; think that conversation occurred about a fortnight before Mr. Simpson died.

To *Mr. Winslow*. Mrs. Rising was a poor woman, but not any poorer than I have oftentimes seen. She as a meddling old woman; I live in Benbow's Factory Row; my daughter and husband live there with me; before I lived in the Brick Row; have been married about three years; my daughter is about 17; have been acquainted with my husband only four years; have two sons, one living here and one in Mexico; have no mulatto child; know Carver's Isaac and once had him taken before a magistrate for impudence to my daughter; never lived in the same house with Isaac as his mistress; I tell this in the presence of God, Court and all.

*James M. Smith* (recalled). The day that Mrs. Simpson came into the store I heard her say that the rats were troublesome in her house. Some one came into

the store after her whom she called Jimmy, and she told him of the rats being troublesome at the house. Could not say that Mr. Simpson ever purchased chrome yellow or tartar emetic. I can remember no items on that account except those purchased by Mrs. Simpson on the 3d of November, 1849. I do not recollect his having purchased salts.

To *Mr. Dobbin*. Mrs. Simpson bought smelling salts on 3d November at the time she bought the arsenic.

*Dr. W. P. Mallett* (recalled). Mrs. Simpson was, I think, pregnant at the time her husband died, I suspected it, but she denied it.

To *Mr. Ashe*. There was no arsenic in the iodine I gave Mr. Simpson. Mr. Hinsdale applied the tests to it during the last week and was satisfied that there was none.

To *Mr. Winslow*. I never prescribed the iodide of arsenic, nor am I familiar with it as a remedy; should think that iodine would be used in scrofulous disorders but should not use the iodide of arsenic. The vial contained simply iodine—not the iodide of arsenic.

*Mr. Warren Winslow*. I see endorsed upon the bill the names of several witnesses who were called before the Grand Jury. Among them, the names of Drs. Gilliam and McRae, who, it is said, were present at the chemical analysis. I submit under the authority of *Regina v. Holden*, 8 C. & P., they should be called by the prosecution. In that case a material witness, whose name was not on the back of the indictment, and whose examination was declined by the prosecution, was called by the Court, for the furtherance of justice. I am aware that in *Martin's case* 2 Ired. 101, our Supreme Court held differently, but the prisoner is entitled to your Honor's opinion, and we wish to raise the point.

The COURT. The Supreme Court has expressly decided in the case of the State v. Martin, that it is the province of the prosecuting officer



and not of the Court to determine who shall be examined on the part of the State, and certainly it would not be becoming in the Court to disregard that opinion. Do the prisoner's counsel propose introducing testimony for the defense?

*Mr. Strange.* The counsel for the prosecution having abruptly closed their case, it is absolutely necessary that the counsel for the defense should have an opportunity of consulting together as to the expediency of introducing testimony in behalf of the prisoner.

The COURT allowed a recess of half an hour.

The half-hour recess having expired, the Court resumed its duties at 3 p. m.

*Mr. Winslow.* The prisoner will introduce no testimony.

MR. M'RAE, FOR THE DEFENSE.

*Mr. Duncan K. McRae.* May it please your Honor—Gentlemen of the jury:—Seven years ago, gentlemen, I left this community, of which I was then a member. It was here that I had spent my early years, and here the associations of my youth are all concentrated. I do not come among you a stranger; I see around me familiar faces; I recognize you all—acquaintances and friends. Some of you—my old friend whom I have in my eye—lent me important assistance in my first advance from the threshold of life, and contributed, in no small degree, to what of prosperity it has been my fortune to enjoy. While resident in this place, I was acquainted with the younger, and especially the female portion of this community; and no community could boast a bevy of more beautiful faces, or more joyful hearts. But among those happy children, and gayest among those most gay, was one who especially combined beauty of person with attraction of manner and openness of heart. Life seemed spread out before her as a beauteous landscape of brilliant colors and lovely tints. I had known the father of her to whom I allude. He was a high official in a neighboring county, and for his honesty and integrity, he commanded the respect and confidence of his fellow-citizens. Gentlemen, what a “change has come o’er the spirit of that young child’s dream!”

That being whom I left so happy, with promise so fair, I find the tenant of a cheerless dungeon; and the glad sun-

shine and the soft breezes of heaven come to her only through the cold bars of the iron grate. The prisoner at the bar, gentlemen, is the poor orphan I have described to you. How mysterious are the ways of Providence! Who can look down the vista of the future to discover his own destiny? Who can foresee how terrible may be his fate? We know not what a day may bring forth.

Gentlemen, wherefore is it, that this large assemblage has filled this hall? What unusual and important occasion has called together a crowd so eager, so intent, so anxious? A man has died—one of your fellow-citizens. And what is there strange or extraordinary in the announcement of death? Are we not like the “grass, that in the morning springs up, and in the evening is cut down, dried up, and withered?” Death is the conqueror of all men; none can escape him; none can successfully contend against his power. He is, in his operations, alike irrespective of age, of sex, or of condition—of time, of circumstance, or of occasion. Do we not see him stoop over the infant on its mother’s lap, and cradle it in his cold embrace—seize upon the young man, strong, vigorous, proud, and bind him hand and foot, and lead him away captive to the tomb—follow at the elbow of the aged, as he totters down the declivities of time, and jostle him into the grave? Gentlemen, “it is appointed unto all men once to die,” and no man can lose or forfeit his proper share in the inheritance of the grave. Even while I am now speaking in behalf of life, how many a silver chord is loosed and golden bowl is broken, pitchers broken at the fountain and wheels broken at the cistern! “Men go to their long homes, and the mourners go about the streets.” What is there, gentlemen, I repeat, strange or extraordinary in this fact, that a man of weak constitution, and feeble, debilitated frame, should follow the ordinary course of nature, and

“Fall as the leaf falls, when Autumn is fading.”

But, gentlemen, there was something in this particular instance which made it unusual. A voice was heard—at

first a faint and indistinct whisper, which soon grew to a loud, distinct, and stern enunciation—that some foul-hand had put a period to the life of the deceased. The public (who are ever ready for the horrible or the marvellous) seized upon the theme. It is borne from mouth to mouth—he who gave the first sign is lost sight of—circumstances of suspicion are traced—and upon bare rumor, ignorant of her accuser, and without the opportunity of being heard, the unfortunate prisoner, in the first gloom of her widowhood, and in the depth of her affliction, finds herself, at once, suspected and convicted before the public, of that most unnatural, most horrible, and most detestable of all crimes, the murder of him to whom before the sacred altar she had pledged her fidelity, her obedience, and her love. Gentlemen, I will not descant upon the storm of public prejudice which raged so violently. I will not stop to condemn, as it deserves to be condemned, the action of the public press for disregarding the right of the prisoner to be considered innocent till her guilt was established—for its violent and vindictive denunciations, for its errors and misrepresentations, but will proceed at once to the investigation of the questions upon the result of which depends the prisoner's life.

First. Did the deceased, Alexander C. Simpson, die from the effects of arsenic?

Second. If so, was that poison administered by the prisoner?

Now, gentlemen, if I succeed in showing that there is a reasonable probability that the deceased perished by other hands than those of the prisoner, or that the evidence is wholly insufficient to establish that he died from the effects of arsenic, then the case of the government is at an end—there will be no necessity of entering upon the question as to whether the prisoner administered to him this poison, and the prisoner will be entitled to an acquittal. Before proceeding to this investigation permit me to say, it may, it will, become necessary for me to speak with candor and freedom. Towards those medical gentlemen

and the chemist to whom I shall be called to allude, I entertain sentiments of high respect and esteem. But, gentlemen, I shall defend this poor and wrecked child who has in part intrusted her life in my hands, with fidelity. I shall examine the proof, and the manner of the proof carefully, strictly and with cautious scrutiny. I shall criticise and speak of the opinions of those whose opinions will be used by the prosecution for the destruction of the prisoner, fairly but fearlessly. I shall, with the permission of his Honor (and from my knowledge of him before whom I appear, I feel that the permission will be accorded), I shall fight this mortal struggle for life, with the same means, the same energy, the same anxiety, the same power, and all the power which the God of nature hath placed at my disposal, as if I combated with a malign foe who was seeking the destruction of my own life. I shall stand in "the imminent deadly breach" between the prisoner and the perils which beset her, let the assault come, whenever, wherever, and from whatever quarter it may. I believe, gentlemen, that there is not a heart in that jury box, that does not throb with sympathy for this unfortunate prisoner—there is not one person there who does not greatly desire that some defence may be made in her behalf by which her life may be preserved. I shall proceed, gentlemen, to show you not only how you may, but why you ought to acquit her.

Gentlemen, you will bear in mind, so far as the medical gentlemen are concerned, that they have pronounced their own incompetency. You have been told expressly by one that he never has been called upon before to search for poison in a human body. He has never analyzed arsenic, and I think you are bound from the evidence to infer that neither of them can, or do pretend to any more knowledge in this matter, than such as they have attained from books, since this case came under their observation. They do not pretend to be chemists, they have read these books, which you see I have before me, and they found their opinions upon what these books say. The other witness, who was

educated at Cambridge, and afterwards practiced chemistry at Munsden, in a house furnished to him, and with a laboratory bestowed upon him—the Rev. Mr. Colton, who preached in this place on last evening a sermoniacal lecture on chemistry, according to his own estimate of himself, would be abundantly sufficient for the prisoner's destruction. But happily for her, if he be judged by other rules, she will be relieved from the danger in which his self-confidence had placed her. Now, gentlemen, I shall take no step in this matter forward, until I ascertain that I have a secure foothold behind. I shall not occupy a position without authority to sustain me, and I protest I do not desire, and shall not ask you to heed any point I may advance, if I do not bring to support me, competent and standard authority.

Did the deceased die from arsenic?

The first reason assigned by the medical witnesses for this belief was, that the symptoms of his disease were such as arsenic would produce. The testimony of Dr. Mallett was given with such clearness and calmness, that I was enabled to take it down precisely as it was delivered; and here, permit me, gentlemen, to remark, that the manner of that gentleman was a model for witnesses, and proved that his only and sole desire was to discharge a duty, and that he was actuated by no such consideration, as the exhibition of his own capacities, or the praise of his own powers. He stated that he was called to see the deceased about ten o'clock, on Thursday the eighth of November, 1849. The deceased had been sick all night, with pain in his stomach—a burning pain, sickness and vomiting—threw up mucus and bile—pulse weak, with great thirst. In the afternoon of that day he had more vomiting—with diarrhoea—evacuations of a dark color—a countenance indicating anxiety and distress. In the evening, he complained of burning more than before, and of pain more than burning. He died near nine o'clock p. m. Dr. Robinson concurred in this statement. These symptoms, gentlemen, were attributed to some irritant poison, and this is the first of a train of reasoning from which the deduction

is made, that the deceased died from arsenic. I shall now show you that all these symptoms, single and combined, may and often do exist in natural diseases. They are the exact symptoms described by authors as indicative of cholera morbus, and have frequently been observed in violent and fatal dyspepsia. The book from which I read, gentlemen, is the trial of Lucretia Chapman, for the murder of her husband, which took place in Pennsylvania.<sup>9</sup> This book is mentioned in Guy's Medical Jurisprudence, as one in which the bar may find useful information. In that trial, Dr. Phillips described the symptoms of the deceased, as follows:—"He complained of a burning sensation in his stomach, and of vomiting and purging. His extremities were cold, his mouth dry with considerable thirst. His countenance evinced anxiety." "I am not prepared," says this eminent physician, "to say that natural causes and natural diseases might not produce the same symptoms."

Dr. Coates, a witness for the prosecution in that case, said, "All the symptoms described by Dr. Phillips that I heard, might attend other diseases." Dr. Hopkinson stated that it was difficult to distinguish between the symptoms of cholera morbus and arsenic.

Dr. Mitchell, who, Dr. Robinson tells you, is a physician of extensive and high reputation, a member of the faculty in Jefferson College, Philadelphia, and a lecturer on chemistry in that institution gives it, as his opinion, that "all the above symptoms do not demonstrate the presence of poison." Now it is very true that the symptoms, as testified to in the case of the deceased, Simpson, were such as an irritant poison, like arsenic might produce, but you cannot reconcile it to your consciences, to decide upon a probability. You would not, in the language of the solemn oath you have taken, "make a good deliverance between the State and the prisoner," if you arrived at a conclusion founded on any other basis, than certainty, absolute certainty. If then you are satisfied from the eminent witnesses I have quoted, that natural diseases would produce the

<sup>9</sup> See 6 Am. St. Tr.

same, or like symptoms, it would be an awful hazard to assume that these symptoms were not produced by causes so capable of producing them, and so likely to produce them.

But, gentlemen, I need not go for authority beyond the witnesses offered in this case for the prosecution. Dr. Robinson and Dr. Mallett, each admit that the symptoms in this case might all have arisen from natural causes. While upon this branch of the subject, gentlemen, it may not be amiss to remind you that there were many of the symptoms of arsenic that were wanting in this case, and surely if the presence of certain symptoms are to be used as indicating arsenic, the absence of symptoms common to that poison should be received strongly to establish that no such poison was there. For example, there was no disease of the heart, no bloody discharge, and no inflammation of the rectum, all these, and especially the last, are essential symptoms to determine the presence of arsenic. Bear in mind, gentlemen that the first reason assigned by the witness falls to the ground. The next index of arsenic to the mind of the medical witnesses, was the morbid appearances of the body upon a post mortem examination. Dr. Mallett describes them—right lung was collapsed, the left adherent, heart natural, stomach inflamed down the small intestines, inflammation through the whole of the external surface—opened the body and it contained about a quart of fluid, of a dark-brown and bloody. One or two points of erosion on the inside of the stomach—number of small white particles.

First, as to the erosions. Exactly the same sort were found in the body of the deceased Chapman; and Dr. Logno, a very skilled physician, who was examined by the prisoner in that case, whose opinion received the notice of his Honor, who tried the case, and upon whose testimony the jury rendered a verdict acquitting the prisoner, declared that such seeming erosions are common to all bodies; are nothing more than cadaverous phenomena—the settling of the blood by its specific gravity—the regular and gradual change which takes place after death.



Dr. Hopkinson in the same case, says a violent case of cholera morbus would present the same post mortem appearances as arsenic. It is considered, says this witness, that the appearances of the body, as to these subjects are fallacious. Again, gentlemen, very great stress has been laid by the prosecution upon the white particles, or white powders, found on the coat of the stomach. Here, of a surety, say they, is the veritable arsenic itself; arsenic is white, and here is something white; it must be arsenic; let the prisoner die. Why, gentlemen I shall show you from that authority which Dr. Robinson pronounced of the very highest standard, that very little consideration is to be paid to this discovery; and least of all, that the prisoner's life is not at all to be put in jeopardy by this branch of the testimony. I cite from Christison, the leading English chemist, and as celebrated as any in the world. He says: "Care must be taken not hastily to consider as arsenic, every white powder which may be found lining the inside of the coat of the stomach. Many other powders may obtain entrance from without. And besides small, white, shining pulverulent scales, not unlike finely-powdered arsenic, but really composed of animal matter are sometimes formed on the mucous coat of the stomach, and intestines." I beg to refer the prosecution to this authority for instances in which this fatal mistake was made by experts, such as were the witnesses on this occasion, and human life only saved from being sacrificed to error by a happy accident. If it be remembered, that syllabub was eaten by the deceased on the day before his death, and it be supposed, that either cholera morbus, or long dyspepsia had inflamed the stomach, the white powders are easily accounted for.

Having shown the symptoms to be natural and the appearances of the body to be so too, I proceed to the chemical tests.

Gentlemen, you are to bear in mind that the medical witnesses are inexperts, they are not chemists, they have never been called upon before to find arsenic in a human

body; and they never have had occasion to analyse this poison. The Rev. Mr. Colton, though he has learned at Cambridge, and practiced at Munsden, and according to his own estimate was once skillful, has been a long time absent from these studies, out of practice, and removed from the opportunity of keeping his capacities fresh and unimpaired.

The first order of chemical tests upon which the prosecution relies are the liquid tests. These consist of the application to the suspected fluid of—

First. The Nitrate of Silver.

Second. The Sulphate of Copper.

Third. The Sulphureted Hydrogen.

Now, gentlemen, I hope, despite the State, despite the physicians, despite the Rev. Dr. Colton and his interesting lecture, I say I hope to be able from undoubted authority to satisfy you that these liquid tests are uncertain, inconclusive and fallacious, and that you would be acting unwisely and unsafely to rely upon them in a matter of such awful moment as that now presented to your consideration.

Dr. Mallett says “that the suspected substance was (after being boiled in distilled water), placed in a vial, and the ammoniacal nitrate of silver applied, which produced a yellow color, the precipitate falling to the bottom and afterwards changing to a brown.” Mr. Beck in his Medical Jurisprudence, (a high authority, proved so to be by the medical witnesses in this case, and known to be so by the whole profession), declares this test to be uncertain and fallacious, and he distinctly declares that this test is at best “but an indication of arsenic.” So also does Mr. Kane in his celebrated work on chemistry. For example—“The diluted solution of phosphoric acid may be, in some cases, precipitated by this test exactly like a solution of arsenic.” Dr. Christison says that this test is not to be depended on where animal or vegetable matter is present, for the precipitate is either not formed, or if formed is essentially altered in color. So you see, gentlemen, that this test is declared to be inefficient, and especially where, as in this case, there is animal or vegetable matter.

The next test, gentlemen, is the sulphate of copper.

The first authority against this test is from Mr. Beck. With reference to this test he says, "again, a green color is produced by its action on different substances when arsenic is not present," page 369. The case of Donnal shows that a decoction of onions would produce the same colored precipitate as that produced by the arsenic when applied to the sulphate of copper. This case well merits the attention of the jury. The circumstances were strong against the prisoner Donnal. The decased was twice taken ill after eating at the table of the prisoner. The symptoms were vomiting, cramps, and a fluttering pulse, and death after about fourteen hours' illness. On dissection, the stomach and large intestines were inflamed, and the stomach stellated in several places. On the application of the tests, the nitrate of silver and the sulphate of copper gave the characteristic appearances of arsenic; but an eminent physician, Dr. Neale, tried these same tests on a decoction of onions, and the precipitates of yellow and green were produced; and upon this experiment that able chemist became convinced, that there was no certainty in the liquid tests—that they were not decisive; and on his opinion the prisoner, Donnal, was acquitted. This case is reported in the English State trials. It was tried before a competent and able tribunal, and it stands forth as a beacon light to warn jurors and judges against relying too implicitly upon the opinions of those who are called scientific witnesses, and the results which are deduced from what is called scientific evidence. But for this accidental experiment by Dr. Neale, the life of that prisoner would have been taken, and, as that experiment demonstrated, upon evidence wholly undecisive, doubtful and fallacious. Well may Mr. Tanner, in his elaborate and great work on chemistry pronounce this test "very fallacious when applied to mixed fluids." Mr. Kane, to whom I have referred, shows that this test, when applied to other substances than arsenic, produces a like precipitate. I shall not trouble you, gentlemen, with any exposure of the test called "the sulphuret-

ed hydrogen," as I learn from the witnesses that this test was not applied. I have to remark, however, upon the singularity of the fact, that this test was omitted, as this is pronounced by the best authorities to be the most delicate of all tests. I suppose, however, gentlemen, that this omission may be accounted for in the fact, that this test involves some difficulty in its preparation, and the witnesses did not feel themselves competent to apply it.

I shall conclude this branch of the subject, by reading you an extract which is applicable to each of the tests which I have discussed. I read from Taylor on Poisons. "No one, in the present day, would think of employing these liquid tests in solutions, in which arsenic was mixed with organic matter (as was the case here). Almost all liquids used as articles of food are precipitated, or colored, by one or both of them, somewhat like a solution of arsenic, although none of this poison be present."

These authorities answer my purpose on this part of the case, and I now submit to you with confidence, that the life of the prisoner cannot be put in peril; much more ought not that life to be sacrificed upon proofs so indefinite, uncertain, and inconclusive. Why, gentlemen, all the authorities declare, that the reduction to the metallic substance is absolutely essential to the proof of arsenic. This is the sure and certain test. When the arsenic is reduced, so that the metallic ring is clearly formed—so that the crystals are sublimated on the tube, and their peculiar octohedral shape is manifested to the naked eye, gentlemen—not to the uncertainty of microscopic view; when this is accomplished, then there is a definite and conclusive manifestation of the presence of this poison, then there is no further room for doubt, and absolute certainty is achieved. Other substances may produce the colors when applied to the liquid tests—may produce the "alliacious odor"—may be reduced to such a resemblance of the arsenical ring as to be mistaken for it. But the shape of the crystals is so peculiar to arsenic, "and so well marked, that a practised eye may identify the 100th part of a grain."

(Turner, 354, 356.) Now, the supposition of the medical witnesses is, that arsenic was in this substance in a very large quantity. When you remember that it requires four or five grains to destroy life, and that one 300th part of a grain may be reduced, so that these crystals, and the peculiar shape of them, may be clearly distinguished, you will readily perceive that such reduction here was easy, if arsenic really was present, I proceed to show you that such reduction was essential.

For this position I refer the gentlemen on the other side, to the opinion of Dr. Bache, in Mrs. Chapman's trial—the opinion of Dr. Logno in the same case—to Turner on chemistry—and last, but not least, in the estimation of the prosecution, to the testimony of the Rev. Dr. Colton himself.

Gentlemen, do you understand how these tests are made? Have you gazed in fancy upon that little vial (attempted to be made a vial of wrath against the prisoner), with the suspected substance, the application of these liquid tests, and the yellow color, and the apple-green? And has it come to this? Is human life so cheap that it may be sacrificed upon a shade of color? Are you to be called upon to slay a fellow-creature, and that creature, a young, but wretched and desolate woman, upon Dr. Mallett's idea of straw-color, or Dr. Robinson's idea of apple-green, or Mr. Colton's notion of a turbid brown? Why, I question if either of these gentlemen (I speak of them with perfect respect), are competent to define colors. It would, I apprehend, have been both an amusing and curious inquiry if their examination had been directed in this channel. But I proceed to show that the reduction tests is fallacious, unless the crystals are sublimed till their octohedral shape is manifest and clear.

The first authority on this point is Mr. Beck. At page 353, he furnishes the objections. "The film of charcoal may be mistaken for arsenic." "Antimony may be reduced to a similar crust." Cinnabar, which is a sulphuret of mercury (according to Dr. Mitchell, a late discovery), "ex-

actly counterfeits metallic arsenic in its appearance.”—*American Journal of Medical Science*, vol. 10, page, 126.

Dr. Mitchell says, in the trial of Mina, page 6. “I now consider that (the crust of metallic arsenic) among the worst tests, since it is imitated exactly by another substance (sublimed sulphuret of mercury), to the eye.” This matter, gentlemen, deserves your consideration. It is in evidence that mercury in a blue-pill was prescribed by Dr. Mallett, and twice administered on the day before the death of the deceased. Now if the prepared stomach contained mercury, and that mercury came in contact with hydro-sulphate of ammonia, this very cinnabar, or sulphate of mercury would be produced.—Turner, 399. You remember that the physicians applied what they called the ammoniacal sulphate of copper, and it is by no means an improbable deduction, that in this way the sulphuret of mercury was produced; and, according to the authority of Dr. Mitchell, from this substance was sublimed the metallic ring, so closely resembling the arsenical.

Dr. Mitchell, in the same trial of Lucretia Chapman, to which I have several times referred, says, that in that very case, upon the application of the sulphureted hydrogen (the most delicate tests), and after a far more careful preparation of the suspected fluid than was made in this case, the precipitate was mixed with charcoal in a tube, and subjected to heat, “when the internal surface of the tube became covered with a black-looking matter, which an unpractised eye might readily mistake for a metal.” And here, gentlemen, were unpractised eyes, and such a mistake was easy. Again, antimony, if placed with the charcoal and heated, deposits the same crust. For the authority on this point I refer the prosecution further to Turner’s Chemistry and to the United States Dispensatory. In the latter, the color of the crust produced by antimony is described as a “brilliant steel-gray,” (precisely the color described here), page 98. Again, the glass itself may acquire a black metallic lustre, from the reduction of the oxide of lead. And

still there is another metal, cadmium, which forms a metallic sublimate like arsenic.—See Taylor on Poisons.

All the authorities agree that the true, the definite, the certain proof of the existence of arsenic is the ring of octohedral crystals whenever arsenic exists in a substance, and especially when it exists to the extent testified to here, this ring can be produced, the crystals are marked and their shape can be easily ascertained; and when ascertained, the proof of the presence of arsenic is unquestionable. The effort to produce these crystals has in this case proved a failure, and the prosecution is left in the attitude of being unsuccessful in the only evidence that would have been certain and satisfactory. I ask, gentlemen, in behalf of the prisoner the benefit of this failure. I come now to dispose in a few words of the "Reinsch's test." I will only cite one authority to show its fallacy. Dr. Guy in his Medical Jurisprudence objects against this test. First, "That the muriatic acid may contain arsenic;" second, "Antimony and bismuth when similarly treated, deposit a similar metal." Third, "Solutions of tin and lead and alkaline sulphurets tarnish the metal."

I have already stated to you that Mr. Colton's testimony was greatly relied on by the prosecution. You observe that he was introduced with some flourish of trumpets and was made to go through with an autobiography of his own adventures in the chemical line; and it must be considered that his history of himself displayed some self-satisfaction. He is the only witness who claims to be an expert in the detection of arsenic. Now, I do not intend, by any means, to treat this witness with disrespect; I protest that no one here entertains for Mr. Colton, as a minister of the Gospel, a man of piety and integrity, more sincere respect than I do; but, gentlemen, the life of my client is at stake—the reputation of her family—the peace and comfort of numerous relatives and friends. Gentlemen, when I cast my eyes towards the prisoner's dock and behold that youthful, but wretched creature—her life in imminent peril, clinging for support upon the bosom of that mother, who alone, with



her aged partner, of all in this wide world, during the prisoner's tribulation has clung to her; when I remember that as other friends have turned a cold eye upon this unfortunate, and withdrawn their sympathy and support; as other relations have "passed by on the other side," this mother has entered into her gloomy cell and taken up her abode with the unhappy sufferer in her cheerless solitude, has appeared with her before this dignified tribunal to stand by her upon her solemn arraignment, when I behold her now, present enduring the shock of this public exposure, and that but for her this unhappy prisoner, would be there a weak and fragil woman, "hapless, helpless, friendless and forlorn;" when I know that if her child perishes ignominiously, she will go down broken-hearted in sorrow to the grave, I feel that I defend the mother when I defend the child; and I should be derelict to my own sense of rectitude, to my own sense of duty; I should deserve a rebuke from His Honor, reproach from my brethern, and censure from the community, if I refrained from a full, free and fearless discussion of the sentiments, opinions, and manner of witnesses—if I failed to make all the defense of which my client's cause is capable.

Under these circumstances, gentlemen, neither Mr. Colton nor any other man has a right or ought to expect to escape thorough criticism.

I have said that Mr. Colton is the most important witness; if I assail him successfully, I overthrow the "head and front" of the testimony. The keystone falls out and the whole arch gives way. I proceed to do so.

You will remember that Mr. Colton lays great stress on the odor of arsenic. He says that smell is easily distinguished, and that the test by the odor is regarded as a "good test by all the authorities." Now, gentlemen this is an important matter. Mr. Colton gives to this circumstance a pregnancy and point well calculated to make it tell fatally against the prisoner at the bar. If then it be established by the best, nay, "by all the authorities," that Mr. Colton is mistaken, that this is not a good test, but, on the con-

trary, one of little value, I ask you, if it will not, if it ought not to weaken the force of his authority, and destroy the effect of his evidence? Let us see. I refer again to the trial of Mrs. Chapman, p. 137. Jarger says, "it is a very insufficient test," Berzelius, "it is always doubtful." Orfila, "This character (the alliaceous odor) belongs to other substances." "It does often happen," says this author, "that we are deceived as to the true character of odors." Orfila acknowledges an error made by himself and Mr. Vanqueline. Dr. Mitchell in the same trial, says, "the arsenical odor is esteemed by high authority a very imperfect test of the presence of arsenic."

Christison, at page 244, says, "this test should be altogether discarded. It does not always detect arsenic when present, and is not an infallible proof that it is present. Zinc, phosphorus, burning paper and animal matter, exhale a like odor.

I leave Mr. Colton, gentlemen, in the bold and prominent opposition he has assumed to the eminent authorities I have quoted, with Mr. Christison the most celebrated of all writers on this subject, at their head. If his self-esteem upon the subject of chemical knowledge affords him satisfaction in this attitude (my respect for him forbids me to say of notoriety), and that satisfaction shall be without harm to the prisoner, I shall not attempt to rob him of its possession, or diminish its enjoyment. Gentlemen, it was bad enough that the government should have sought the prisoner's life upon the "shades of color," but it is too much, it is too great a tax even upon your supposed inhumanity, to ask you to commit her to death because Dr. Mallet smelled a smell, Dr. Robinson smelled a smell, and Mr. Colton smelled a smell; especially when Mr. Colton, who relies most on the olfactories, confesses that his own nose is out of order, in a dilapidated condition, and can only be aroused to perception by a "pungent odor." Why, gentlemen, such a nose can no more distinguish between onions and arsenic, than can a deaf ear distinguish between a cannon and thunder.

Well, gentlemen, if it should be found that besides being contradicted by authority, Mr. Colton contradicts himself, what further reliance is to be had on his opinion? Will you not avail yourselves of the opportunity of taking this main spoke out of the wheel of the government, that the prisoner whom you have in charge may be delivered from being crushed?

On the first page of Mr. Colton's evidence, he tells you that "the only ground of absolute certainty is the reduction of the metal." Yet on the third page of the same lecture, while he informs you that he did not succeed in the reduction, "he looks on the other tests as conclusive."

Why, how can this be? I had always supposed that any reasoning to be conclusive should be certain—or in Mr. Colton's language, absolutely certain. Yet this witness while regarding one test alone as certain, arrives at a conclusion upon other tests, and that too in the face of a failure in the application of this. If these opinions be not contradictory, they need a "remark" from Mr. Colton collateral to the paper to explain how they coincide.

I have now shown to you how contradictory are the authorities with regard to these tests—how uncertain, inconclusive, and fallacious are the tests themselves, each and singly, and I submit it as a rule of evidence, that you cannot arrive at a certain result through a train of uncertain circumstances. You cannot make with bent and broken links a perfect chain; and I ask you, gentlemen, if opinions so contradictory and so liable to error should weigh in the balance against human life? These witnesses all spoke with certainty and confidence—there was no faltering and no hesitation. This rather argues them to be inexperts, they have no ground of their own to stand on, they rely solely upon the books, they use the language of the books, and describe the colors, etc., by the very names in the books.

This is not the course of an expert. He is cautious, wary, not confident, but scrutinizing, feeling his way at every step. I commend to your attention, as a matter of contrast to the

testimony of the medical and chemical witnesses here, the evidence of Dr. Mitchell, in Mrs. Chapman's case. There the nitrate of silver gave the "yellow-brown flocculent precipitate" as here. The sulphate of copper, an "undecided grass-green." (Here Mr. Colton describes it as giving "not quite grass-green with blue tint.") There the heat discovered on the tube "a black-looking matter which an unpracticed eye might mistake for metal, for, although black, it was glistening." And there was the odor as it was said to be here, and yet in that case that distinguished chemist and physician declared that "all these tests gave no conclusive evidence of the presence of arsenic."

I submit now, gentlemen, that the physicians have failed in a most important particular, upon which alone the prisoner is entitled to an acquittal. You have been often admonished and you are fully aware that the State must make out every part of the case—there must be no loop on which to hang a doubt. You have heard of the tests by which the presence of arsenic was demonstrated. Now the physicians failed to analyze those tests. This is important. There may have been arsenic in the very tests themselves. I shall undertake to show you that there was, and I ask you if it was not vitally important to the prosecution that its scientific witnesses should have analyzed these tests and extracted this arsenic, before the application of them to the suspected fluid.

They did not do so; but I expect to be able to establish that they put sufficient arsenic into the suspected fluid when they applied the tests to produce all the results of color and odor and the reduction of the metal.

First, then: Has nitrate of silver any arsenic? This nitrate of silver contains nitric acid. (United States Dispensatory, 866.) Nitric acid contains sulphuric acid, or, rather, is manufactured out of it; and sulphuric acid contains arsenic. (Taylor on Poisons, 283; Kane, 383.) That it is important to analyze these tests, see Medical Chirurgical Review, page 472.

Second. The sulphate of copper. This is made from old

scraps of copper and sulphuric acid (U. S. Dispensatory, 275), both of which ingredients have arsenic. (See Kane, 391; Med. Chi. Review, 472.)

Third. Sulphureted hydrogen is hydro-sulphuric acid, which contains arsenic.

And, fourth, the copper plates and the muriatic acid, both in Reinsch's tests contain arsenic. (Guy's Medical Jurisprudence, 593.)

"In the employment of chemical tests," says Mr. Taylor on Poisons, "it is especially necessary to determine that they are pure before the analysis is commenced. Arsenic may be contained in the sulphuric or muriatic acid." And yet, gentlemen, here was no effort made to ascertain that the tests were pure; they were taken on trust out of the shops, and used without being analyzed. If so, according to the best authorities, the experiments were incomplete, and the life of the prisoner ought not to be hazarded.

Again, another fatal error by the physicians was placing the animal substance taken from the body in vessels which had not been examined, and whose purity had not been tested, to-wit, in vials and iron pots. I will cite on this point, Mr. Taylor on Poisons, 118. "Iron or metallic vessels ought never to be employed in an analysis of the viscera; the iron almost always contains traces of lead, copper, tin and arsenic. Yet, in this case, the iron vessel was used. In all cases, it is proper that the analyst should test his tests. (Taylor, 119.) This important duty here was entirely omitted.

Next, gentlemen, the disposition of the prepared portions of the stomach. According to the evidence of both physicians, "they were set aside—aye, in that house where was excitement, confusion, the entrance of many persons, running to and fro—not out of the way, not out of reach, but, so far as the evidence discloses, they were within the reach of any evil-disposed person who might choose to take advantage of the opportunity. Why, gentlemen, how can you undertake to say, upon your oath, that arsenic might not have been placed in this vessel after it was set aside? Has the Govern-

ment shown you that it was not beyond a doubt? If not, then here is an insurmountable barrier to the conviction of the prisoner.

The last matter on this part of the case is, that there is no conclusive evidence that the substance purchased by the prisoner was arsenic. It was sold for arsenic. A substance like it has been sold to others for arsenic. The clerk at the drug store supposed it was arsenic; but you are not to take a supposition. If the bottle from which this was taken had been recognized and delivered to the chemist, and its contents analyzed and found to be arsenic, then there might be said to be proof of the circumstance; but in the absence of all this, there is no satisfactory proof; there is nothing more than conjecture, that arsenic was the substance purchased by the prisoner. Now, gentlemen, in view of all this—of all the matters I have brought to your attention—of these fatal omissions and errors, and want of caution, I ask you, in the presence of God, on your solemn oath, how can you convict the prisoner upon this testimony. Can you rob her of hope, take away her life, cut short her existence, deprive her of her probation, and send her “unanointed and unannealed” into the presence of the dread Jehovah, on evidence like this? Have they not failed in essential particulars—have they not committed fatal errors? The prepared substance laid carelessly aside, the vessels not purified, the tests not analyzed; where is the evidence by which to arrive at a sure and safe conclusion?

I wish now to present to your consideration another view of this case. In order to present this view, it will be necessary for me to examine into the poison known as antimony, out of which tartar emetic is manufactured. This poison produces the same symptoms as arsenic—inflammation of the stomach, purging, vomiting, and death. The post-mortem examination would develop the same appearances as from arsenic. (See U. S. Dispen., 797.) There would be the same erosions and the white powders. (Guy’s Med. Jour., 640.) By some tests antimony may be made to precipitate the same

colors as arsenic. For authority on this point, see Kane, 381, and Turner, 336. Antimony deposits the same crust as arsenic (Turner, 357), which is described in the U. S. Dispensatory as being of a brilliant steel-gray color. (See page 98.) Besides, gentlemen, antimonial preparations, such as tartar emetic, contain, of themselves, arsenic. For authority on this point, I read from U. S. Dispensatory, p. 98, and from Taylor on Poisons. If this be so, and the supposition be that he died from tartar emetic, all the results would be produced from such test as were here produced. I submit, gentlemen, that it is in evidence that the deceased purchased tartar emetic a short time before he died. You will remember that we asked this question of the young man Smith, the clerk in the drug store of Mr. Hinsdale; he could not remember the sale. We then presented an account in the handwriting of Mr. Hinsdale to refresh the witness' memory. We allege that that item of tartar emetic was up on the account. We could not ask the witness that question without introducing the account as evidence, and the object of the prisoner's counsel was to avoid the introduction of evidence. But the prosecution had it in its power to have proved, if the fact was not so; they could have produced the account, they could have examined Mr. Hinsdale, and from their failure to do so we have a right to ask you to infer that the deceased purchased the poison I have named, a short period before he died. In order to get the view of the question I am about to present, it is necessary I should admit the disagreement between the deceased and the prisoner. In England, when a man committed suicide, his goods and chattels were forfeited to the crown. It became there oftentimes an important question whether a person was a "*felo de se*." I will suppose, then, that such was the law in North Carolina, and that the forfeiture was to the University, and that I was now representing the University and endeavoring to establish before you that the deceased died of poison, administered by his own hands. It would be incumbent on me to show a train of circumstances leading to this conclusion. What are the circumstances, gentlemen, arising upon the evidence which has been offered, go-



ing to establish this fact? It is in evidence that Alexander C. Simpson became attached to and some few years since wooed and married the prisoner at the bar. For a time they lived together harmoniously, contentedly, and happily. But soon some foul Iago uttered suspicions of the virtue of his wife—whispered in the jealous husband's ear, "But if I give my wife a handkerchief," thus stirring up thoughts,—

"And making them to come o'er his memory,  
As does the raven o'er the infected house,  
Boding to all."

He was a man of keen and quick sensibilities and elevated pride, and the engendered suspicions weighed heavily upon his heart and mind. Having been cheerful, contented and happy, he became gloomy, desponding and dispirited. From having been kind, tender and affectionate, he became morose, severe, quarrelsome; till he could no longer conceal his emotions, but made an open rupture—wrote to her, upbraiding her infidelity—"I once thought you loved me, but I have reason to think that you like another better. You can be my wife no longer."—The ebullition of a broken spirit, and a heart that felt itself deserted and betrayed. About this time he purchased a deadly poison—he is taken ill—his wife offers to him the services which a true and tender wife would be likely to offer, and he rejects them and thrusts her rudely aside.

He dies,—his symptoms are all of the kind and in the degree which the poison he had purchased would be likely to produce. After his death, his body is examined, and such appearances are discovered as the poison which he purchased would be likely to present—much more so than arsenic would; for, here, both lungs were affected, the "one adherent, the other collapsed;" and antimony "principally affects these organs." (Beck, *Med. Jour.*, p. 419.)

The contents of the stomach are prepared and subjected to tests, by medical men and chemists, and all the investigations exhibit just such results as the poison which the deceased had purchased would be likely to display. And after he is dead,

no trace of that poison can be found upon his premises, and no account given of it. Gentlemen, my association with the deceased has ever been of a kind character, and I mean to deal as tenderly with his memory as my duty will permit. But I ask you if here is not a strong chain of circumstances going to establish (if the evidence be believed), that he perished by his own act. If you should think from these circumstances that there is a reasonable probability of this, I apprehend his Honor will instruct you that the prisoner is entitled to an acquittal. You must remember that I have admitted the above facts only to enable me to present this view, and if it should have no other effect it will at least show you the uncertainty of circumstantial evidence. For here is a train of circumstances leading more strongly to the conclusion that he perished by his own act than any produced by the prosecution to show that he was murdered by the prisoner.

Thus, gentlemen, I have endeavored to combat the accusation that the deceased died from arsenic. I have shown such proof does not exist from the symptoms and post-mortem appearances, for these are common to natural causes; nor yet from the chemical analysis, for all the tests which were claimed to have been tried successfully are declared by the best authorities to be uncertain and fallacious; and it is not sound logic to derive infallibility out of a collection of fallacies, to arrive at inevitable truth from loose and scattered uncertainties. In addition to this, it has been proved that the only experiment which would have been conclusive was tried without success. Gentlemen, I pray you, do not cut loose from your moorings and launch out from a safe haven into the broad, wild ocean of surmise and conjecture. There you will have no compass to look to, and no star to guide you over the waste of waters. Beware, lest, upon hidden shoals, or amid fatal breakers, you destroy a life which you can never restore, and forever shipwreck your own happiness and the peace and quiet of your own consciences.

May it please your Honor, I have but now reached the second point in this inquiry: Whether, if the deceased died from arsenic, it is proved to have been administered by the

hands of the prisoner? But, sir, I feel exhausted and worn out; and, although greatly desirous of doing so, I am not able to enter upon this investigation. I am relieved by the consciousness that I have able and competent associates who will pursue this inquiry.

With your Honor's permission, then, I will leave this part of the defense in their hands. Before I close, gentlemen, I beg to remind you that this case is unusual in its circumstances, unusual in the nature of the accusation, unusual in the person of the prisoner. It calls, therefore, for extraordinary care, deliberation and examination. The amiable but zealous and able gentlemen who conduct the prosecution, I have not a doubt, intended to conduct it generously and magnanimously. But I think when they reflect upon their refusal to follow the usual course, and permit the Government witnesses to be separated as the prisoner requested—when they reflect that they had witnesses who were not introduced, who would have contradicted some who were introduced, and that others have been withheld from the stand who would have testified to facts beneficial to the prisoner, I think they cannot give themselves credit for extraordinary liberality. Gentlemen, they will make to you ingenious and specious arguments. In the midst of their ability and ingenuity, do not lose sight of what I have uttered in behalf of the prisoner.

Gentlemen, the scenes in this solemn drama are drawing to a close, and soon the curtain will rise upon the last act, where you will sustain the prominent characters. On the one hand is the rendition of the awful verdict of "Guilty,"—and the prisoner is remanded to her gloomy and cheerless cell, then the pronouncement of the dread sentence of the law, and a definite period is affixed as the limit of her life. Then the terrible suspense, the sad preparations, the appointed hour, her fair neck bared and circled by the hempen cord, her delicate frame enveloped in the felon's shroud, and the scene closes upon the gallows and the grave.

On the other hand is the bare pittance of life. You cannot give her peace—you cannot restore her to joy. No more will

the glad sun of prosperity shine upon her way, or the sweet flowers of pleasure spring up in her path. She stands shivering amidst the pitiless peltings of the storm of adversity. Her springtime and her summer have faded out, and all around, far as her eye can reach, is mantled with the white sheeting of misfortune's wintry snow. But, gentlemen, you can let her live. You can allow her, for her allotted time, to remain where "mercy is to be sought and pardon to be found." Gentlemen, the last rays of the setting sun after this fair and lovely day have ceased to linger on the horizon and the gathering shades of night and the fitting clouds are closely emblematic of the prisoner's dark and desolate condition. But these clouds will disperse—that sun will rise again to shine upon the evil and upon the good; and oh, may his coming rays shine upon her, a freed and liberated woman!

Gentlemen, with my associate counsel I visited the prisoner on yesterday in the dungeon of which she was a tenant. At the hour when we visited her the bells from your different churches were announcing that the people, in obedience to the proclamation of their chief magistrate, were assembling round their several altars to return devout thanksgiving to Almighty God for the favors vouchsafed them. We had gone to inform the prisoner of the absence of an important witness and to lay before her the propriety of continuing her cause.

When we had finished, with eyes streaming with tears and a face white as yonder wall, she replied: "I know not what to do—act as you think best: but I am as much in the hands of God today as I will ever be."

Gentlemen, to that country upon which she has put herself, and into the hands of that God in whom she professes to trust, I commit her cause.

MR. ASHE, FOR THE STATE.

*Mr. Ashe.* Gentlemen: The eloquent and able counsel who has just addressed you has touchingly referred to the days of his boyhood and his acquaintance and associations with the prisoner at the bar. I, too, gentlemen, have had some

acquaintance with the prisoner in bygone days, and when I cast my eyes into that dock, and behold there the unfortunate prisoner, with her devoted parent by her side, active memory calls up reminiscences of the past which painfully impress me with the vicissitudes of human life. When a lad at school, I was an inmate of her father's house, and as a boarder there was treated with kindness and attention by both her parents. The prisoner was then a mere child, fresh from the hand of her Maker—of that tender age when the follies and vices of the world had not as yet marred the work of Nature—when cares had not yet begun to corrode—when the countenance still beams with native felicity, and the heart rejoices in unconscious innocence. Since then eighteen years have rolled by, and I see the prisoner at the bar for the first time again, but, alas! how changed! The days of her innocent childhood have fled. I see her a woman—clad in the habiliments of grief—wearing the weeds of widowhood—occupying that seat in this house assigned to the lowest and basest felons—the unenviable cynosure of all eyes, and charged with a crime, no less heinous than the murder of her husband by poison—a crime, justly considered, of all others, the most horrid and detestable, because it is usually committed in secret and so insidiously that no forecast can prevent it—no manhood resist it. These circumstances are well calculated to render my situation unpleasant. But reason points out my path, and duty bids me pursue it.

In the investigation of this cause, gentlemen, the only inquiries you have to make, are, 1st. Is Alexander C. Simpson dead? 2d. Did he die in the County of Cumberland? 3d. Was arsenic taken into his stomach the cause of his death? and 4th. Was that arsenic so causing his death administered by the prisoner wilfully and with malice aforethought? Each fact involved in these four respective inquiries is an essential element of the crime with which the prisoner is charged. To warrant her conviction, it is necessary that each should be found in the affirmative. That Alexander C. Simpson is dead and that he died in the County of Cumberland, is not only

proved but conceded. The two first inquiries are then put beyond all disputation. Then, did he die of the effects of arsenic? This puts us fairly on controversial ground. The State relies on circumstantial evidence to establish this fact, and insists that it is as amply and conclusively proved as a matter of this kind can be. No witness has been offered on the part of the State, who saw the poison administered, and swallowed down into the stomach of the deceased. But you have been furnished with the only evidence which is attainable in such cases—the testimony of gentlemen of skill and science; two of whom attended the deceased in his last illness; observed his symptoms, made a post-mortem examination of his body, searched for marks of poison in his stomach, carefully prepared its contents for chemical experiments, and subjected them with all due care to the usual tests for the detection of the presence of arsenic.

Dr. Mallett, a young physician, who has done himself great credit by the self-possessed, intelligible and able manner he has given his testimony on this trial, has informed you that he saw Simpson on the morning of the day on which he died—his countenance indicating great distress—complaining of an intense burning in the pit of his stomach, accompanied by nausea, vomiting and purging, with a weak and feeble pulse. That when the stomach was taken out and examined the mucous membrane was found very much inflamed, as also the duodenum—that there were discoverable some two or three erosions on the inner coat of the stomach and a number of white particles deposited there, though not particularly on the erosions. These, the doctor tells you, were some of the symptoms and marks of arsenic upon the human system. Though he candidly admits and so does Dr. Robinson, who also visited the deceased in his last illness, that these symptoms and marks of themselves, independent of the experiments afterwards made would not have brought their minds to the conclusion that Simpson died from the effects of arsenic taken into the stomach. But numerous experiments were performed—a variety of chemical tests

were applied. You will remember the stomach was taken out the Saturday after Simpson's death, and placed in a clean vessel, and a part of the contents of the stomach put in an evaporating dish, and evaporated by heat until a residuum resembling cheese was obtained, which was boiled in distilled water until dissolved, and this solution was filtered through paper, for the purpose of freeing it from any organic matter that might have existed in the contents of the stomach. A precaution which shows the skill and care with which the experiments have been conducted. The fluid thus obtained was then subjected to the following tests. First, to what is called the liquid tests. To a part of the suspected fluid was added ammonia nitrate of silver, and a rich yellow precipitate, gradually changing to a brown, was the result—the arsenite of silver, a compound of silver and arsenic. To another portion was added the ammonia sulphate of copper, and a rich green precipitate was formed—the arsenite of copper, a compound of arsenic and copper. The yellow precipitate was then put in a test tube, and heated until it sublimed and settled in a cooler part of the tube in the form of crystals. These crystals were then taken and boiled in distilled water until dissolved, and the solution treated with the ammonia nitrate of silver as at first, and the same yellow precipitate was obtained. A like experiment was made with the green precipitate, with a corresponding result. Still another portion of this suspected fluid was placed in a test tube with strips of copper, which were very soon furnished with a coating of a steel color. Correlative experiments were then resorted to. A solution was made of what was known to be arsenic and that solution was then subjected to the very same processes that I have just described, with the very same results. An attempt was then made to apply the dry or reduction test, as it is called. The suspected fluid was put in a tube with charcoal and highly heated, when a ring of metallic appearance was formed on the side of the tube, which resembles the ring described in the books as the metallic



ring, but the experiment was at that time carried no further. Therefore the physicians were requested to repeat the experiment during this term of the court. Accordingly, during this very week, Dr. Robinson informs you that he has applied the reduction test to the white particles obtained from the inner coat of the stomach of the deceased. These white particles were placed by him with a flux in a glass tube, and heated until it was sublimed into a cooler part of the tube, where it was condensed and formed a ring of a steel-gray color, and a few crystals. On examining this ring with a microscope, it was found to possess that metallic lustre, peculiar to the metal of arsenic. That part of the tube containing this ring with the crystals, was filed off and placed in a larger tube, and by the application of heat other crystals were obtained but of what form Dr. Robinson is not able to inform us, nor do I think it is at all necessary, inasmuch as none of the authors whom I have consulted, seem to lay any stress on the shape of the crystals. These crystals, you will remember, were dissolved in distilled water, and the solution subjected to the liquid tests with the most satisfactory results. A similar experiment to this was then performed by Dr. Robinson, with what was known by him to be arsenic, with similar results. Dr. Colton, who was called in by the physicians to assist in the experiments during the week after Simpson's death, is no physician, therefore knows nothing about the symptoms, but is a practical chemist, and has been engaged in laboratories and in delivering lectures on chemistry, from time to time, for the last thirty years, performed a number of experiments with the contents of the stomach, furnished by Drs. Robinson and Mallett, which are identified by them, and whose identity in fact, is not questioned by the defendant's counsel. These experiments satisfied his mind of the existence of arsenic in the stomach of Simpson. He tells you, however, that the only test which can be relied upon with absolute certainty is that by reduction, which was not applied by him, but he has heard, he says, the testimony

of Dr. Robinson in regard to the experiments he made during this term of court, and he says, if the results were obtained, as described by Dr. Robinson, it was a successful application of the reduction test. The arsenic was reduced to the metallic state, and if there was any uncertainty before, this puts the fact of the presence of arsenic beyond all doubt. Drs. Robinson and Mallett give it as their decided opinion, from the symptoms exhibited by the deceased, from the marks of inflammation disclosed in the stomach and duodenum, and from the experiments made by them and by Dr. Colton, that there was arsenic in the stomach of Alexander C. Simpson when he died.

The experiments that have brought these witnesses to the conclusion that there was arsenic in the stomach of Alexander C. Simpson when he died, are identically those which are furnished by the ablest writers on toxicology, and afford in fact, with some few others (not more satisfactory), the only means of ascertaining the existence of arsenic. It is a question of medical jurisprudence—a question which none but scientific men can determine. Hence, we have introduced these learned gentlemen—one an able and experienced chemist, and the others, physicians of eminence and skill, who, in the pursuit of their medical studies, have necessarily had their minds directed (and I should think with great diligence) to the subject of chemistry. On medico-legal questions like this, the opinion of gentlemen of skill and science must be taken by the jury, and “freely trusted as in other more abstruse parts of medical jurisprudence.” His Honor will so declare to you—leaving you to judge of their credit and competency. That these gentlemen are men of high character cannot be disputed—that they are competent to give reliable opinions, I have only to refer you to the able and luminous testimony which they have given. Their testimony then must be relied on. The law declares it—justice demands it—humanity requires it—the well-being of society enjoins it. Reject it! let it be understood that such testimony is not to be relied upon to warrant a conviction of the crime of

murder, and you impair the securities of human life—you strengthen the arm of the wicked, and give encouragement to many a dark scheme of human villainy, now held in check by the fear of the hangman's whip. Such testimony, I say, must be relied upon by the jury. It cannot have failed to satisfy your minds, gentlemen, that Simpson died of the effects of arsenic. Yet, in opposition to this testimony, thus satisfactory as I think you must consider it, you have heard from the able gentleman who has just addressed you, an earnest and ingenious argument affecting to prove that Simpson did not die of arsenic. You are asked, was it strange that a man of feeble health should sicken and die? Not at all, gentlemen. But it would be strange, that where a man, in either feeble or robust health, sickens and dies, and a quantity of arsenic is found in his stomach, you should undertake to say, that he did not die of arsenic, when no other rational account of his mortal infirmity can be given. But the defendant's counsel says, Simpson did not die of arsenic—there was none in his stomach. In the first place, he says, the physicians were incompetent—they were mere inexperts—no chemists—and Dr. Colton's testimony is so contradictory in itself, and so variant in the point of smell, from the most eminent writers on the subject of chemistry, etc., that no reliance can be placed on his testimony—not because he is corrupt—not because he is not the very soul of truth and honor, but because, forsooth, he is not as lucid as some in his phraseology, and principally because his nose is in a state of dilapidation. Secondly, it is objected that the experiments made by these gentlemen, were altogether inconclusive and unsatisfactory. I have nothing to add to what I have already said on the subject of the competency of the physicians, and as to Dr. Colton, I do not consider that there is any irreconcilable discrepancy in his testimony. It is true, he says, the only ground of absolute certainty was the reduction of the arsenic to the metallic state, and that all the other tests amounted only to a probability, more or less strong and as the tests are more or less distinct,

and as correlative tests coincide with each other. The reduction test was not applied by him, which he admits would have rendered the evidence stronger, but that the evidence derived from the experiments which he had made was conclusive—meaning that the tests were so distinct, and the correlative tests so coincided with each other as to satisfy his mind of the presence of arsenic. I cannot, for my life, see any such gross blunder or contradiction in this, as to subject the reverend gentlemen even to ridicule much less to discredit. And that the doctor should think the garlic odor was a very good test of the presence of arsenic, is not so extravagant a position as to set aside his testimony. Dr. Mitchell does perhaps say, it is not to be relied on, but nearly all the chemical writers speak of this peculiar odor as indicative of the presence of arsenic. If Dr. Colton had relied upon the garlic odor given out by his experiments alone, I should say myself, throw his testimony aside; but he has made numerous experiments, some identical with those performed by Drs. Mallett and Robinson, and others that were not performed by them. Dr. Christison is quoted to show that the white powder found in the stomach might have been animal matter, which sometimes resembles arsenic. But the reply to this is, that there is no animal matter, which, when subjected to the tests employed in the analysis of the white substance taken from the stomach of the deceased, would afford similar results.

It is urged that the liquid tests cannot be relied on—that that of the ammonia nitrate of silver is fallacious, for that when mixed with phosphoric acid, a yellow precipitate is obtained, exactly resembling that obtained by mixing it with a solution of arsenious acid. That is true; but when the solution of phosphoric acid is treated with the other liquid test, the ammonia sulphate of copper, the precipitate is altogether different from that which is thrown by applying the same test to a solution of arsenic. Dr. Griffith in one of his valuable notes to Taylor's Medical Jurisprudence, says, "that medical jurists appear to have overlooked the fact that a solution of phosphoric acid is

precipitated by this test (ammonial nitrate of silver) exactly like a solution of arsenic, but the answer to any objection on this ground is, that phosphoric acid either gives no precipitate, or one of a pale blue color, with the ammonial sulphate of copper," not of a green color, such as is obtained from the solution of arsenic. Onions, it is said, yield the same precipitate when treated with the liquid tests; but you are not told that when heated with a flux in a tube, they sublime and form a ring, of a metallic lustre, like arsenic. If authority to that effect existed, such is the active research of the gentlemen for the defense, that it would be produced and read; but none such is produced and I therefore presume none such exists. Onions, then, could not have been the substance found in the stomach of Simpson. It is further insisted, that antimony, when subjected to heat in a tube, will produce a dark shining crust, very similar to that deposited by the arsenious acid; but they do not show, and I insist cannot show, any authority to the effect that antimony in solution, when treated with either the ammonia nitrate of silver, or the ammonia sulphate of copper, will throw down the same precipitate which a solution of arsenic does; and the very same may be said of tartar emetic, which is a compound of antimony. The physicians tell you, and the books bear them out, that there may be found substances which, when subjected to the various chemical tests employed for the detection of arsenic, will now and then give a result similar to that which arsenic would give, treated with the same test; as, for instance, onions, antimony, tartar emetic, cadmium, etc., but that there is no other one substance in the whole range of materia medica which, when subjected to all the chemical tests, will be attended with the same results as arsenic in every experiment. Hence the importance of trying a variety of experiments with the suspected fluid as was done in this instance; for when they succeed, as was the case here, in giving results precisely the same with what is known to be arsenic in each and every correlative experiment, they are not only strong-

ly corroborative of each other, but cannot fail to satisfy every mind of the conclusive character of the proof.

Mr. McRae argues that the experiments with the liquid tests are not to be relied on, and that the only test that can give anything like certainty is the reduction test, which he alleges was not satisfactorily applied by Dr. Robinson, because the doctor cannot tell you that the crystals obtained by the sublimation and condensation of what he supposed was the metallic ring, were of an octahedral form. The doctor admits that he could not ascertain the form of these crystals with a microscope but that the crystals, when dissolved and subjected to the liquid tests were precipitated exactly, as a solution of arsenic would have been. And I again repeat, that I find in no author that I have consulted any stress laid upon the form of the crystals. They say the crystals are octahedral, but they do not seem to deem it essential to ascertain that fact, but as a matter of minor consideration, especially when the chemical experiments succeed in attaining the more important results. But I do not wish to be understood as yielding the point insisted on by Mr. McRae that the reduction of the arsenic to the metal is the only certain and reliable test. For admitting, for argument's sake, that Dr. Robinson's trial with the reduction test was abortive, which, by the way, I wholly deny, still I insist, that the other chemical experiments were altogether sufficient and satisfactory in warranting the Rev. Dr. Colton and the physicians, in the conclusion that there was arsenic in the stomach of Dr. Simpson. For Mr. McRae's position, that no test is to be trusted but that of reduction, Dr. Turner and Christison are cited; but to show you that such a position is not tenable, I will beg leave to read a short passage from Taylor's *Medical Jurisprudence*. "An important medico-legal question has arisen in relation to the tests for arsenic, viz., whether we can rely upon any tests for this poison, independently of its reduction to the metallic state. It is absolutely necessary, chemically speaking, to obtain the metal in order to say that arsenic is present in an unknown case.

There is a popular prejudice in favor of this metallic reduction, and courts of law, as well as the public, are disposed to regard the obtaining the metal as the only conclusive proof of the presence of this poison. The acquittal of Donnal, at Launceston in 1817, mainly took place from the circumstance, that the medical witnesses could obtain no metallic arsenic. They trusted to the liquid reagents alone, and these had unfortunately been applied to colored fluids mixed with organic matter. . . . This being purely a chemical question, must, of course, be answered on chemical principles, for it is chemical certainty that the law requires. If a white powder were presented for analysis, and it was found to possess distinctly the three first characters pointed out (p. 126), could any chemist entertain a reasonable doubt that the powder was white arsenic? I think not. The reductial process might corroborate, but I do not see how it could add greater certainty to the results thereby obtained; and in heating such a powder with flux, the chemist knows that a metallic sublimate must of necessity be formed, for there is no white solid in the whole range of substances known to chemistry, if we except arsenious acid, which possesses the three characters mentioned. If we are so situated that we are obliged to rely upon one test only, then the process by reduction should be preferred; but even here so many mistakes have been made relative to the supposed metallic crust obtained from an unknown solid, that Dr. Turner (the very person quoted by Mr. McRae) and others say, that it should always be reconverted to arsenious acid, in oxidating it by heat, and that the white solid thus produced should be tested by liquid reagents." This last experiment was made by Dr. Robinson as I have before described to you, and Dr. Turner thinks it the most satisfactory; and you will notice that neither Taylor or Turner, in the passage I have read, say anything of the form of the crystals. But then my friend, Mr. McRae, in further support of this favorite position, informs you that he is supported by the opinion of Dr. Christison, one of the most eminent writers on toxicology, who on that



subject has been in England what Orfila has been in France, but does this erudite author differ on this subject from Taylor, Turner and others? Listen to what Taylor says, who recites from the work of the distinguished doctor: "Dr. Christison justly considers that the reductive process is not more conclusive in the opinion of a chemist, than the method by the fluid tests; but he regards the former to be necessary rather as a concession to the unscientific minds of a criminal court and jury." (P. 247.)

So, I have now shown you, upon the authority of this gentleman's own witnesses, the learned and distinguished physicians, chemists and toxicologists, Christison and Turner, that the reduction test is not more conclusive than the liquid test; and if it is more conclusive than I have shown you upon the authority of Drs. Robinson and Colton, that the chemical process of the reduction to the metal has been conducted to the most satisfactory result. Next, it is insisted if I understood Mr. McRae's argument, that the tests used in this instance to detect arsenic will detect the minutest quantity, and that perhaps the arsenic discovered by the experimenters may have been small quantities in composition with some materials used for preparing the tests. It would be strange, if arsenic does enter into the composition of any of the chemical ingredients used for preparing the liquid tests, that the writers on chemistry and toxicology have not advised their readers of the fact, and guarded them against the delusive character of the chemical agents they are recommended to employ for the detection of the presence of arsenic. Yet we meet with no such admonition. None is read to you, and that this is said in the books about the purifying of those chemical agents, is a circumstance which goes far to show how little weight should be attached to this argument, which, though ingenious, is yet specious and far-fetched. You are asked how can you rely upon the physicians and the chemist who applied the tests in this case, when in the case of Mrs. Chapman, tried a few years since in Pennsylvania, for a similar offense, Dr. Mitchell, of Philadelphia, a justly celebrated

professor of chemistry in Jefferson College, to whom the contents of the stomach of Mr. Chapman were submitted for analysis, and who was examined as a witness in that case, testified that notwithstanding the tests were applied by him, he could not say there was arsenic in the contents furnished him. I, gentlemen, read the testimony of Dr. Mitchell in that case very differently. The doctor most certainly said there was arsenic in the stomach of Chapman—and I think he says he is constrained to come to that conclusion, from the symptoms described, the appearance of the stomach, etc., and the experiments which he had made,—this, it is true, was not very satisfactory, but with the other circumstances, they satisfied his mind, as a chemist, of the presence of arsenic. It is next asserted that the substance found in the stomach of Simpson was tartar emetic, and is insisted that it is in proof that Simpson purchased tartar emetic from a drug store a few days before his death;—and what is the proof? Why, counsel say, forsooth, that they had a paper, which they alleged was a copy of the druggist's day-book, in which the tartar emetic was charged to Alexander C. Simpson; but that the State's counsel objected to its admissibility, because they knew it would establish the fact; therefore the jury must be satisfied of the fact. This is certainly a very extraordinary position, that the jury should receive that as evidence, which is offered to be proved, but is rejected as inadmissible, merely because the opposite counsel object to its introduction. It would be an easy matter to prove anything you might please, if such was the rule of evidence. The counsel in a cause would only have to allege that he could by a certain paper show a certain fact—offer it in evidence, however improper and inadmissible it might be, and then, because on proper grounds it is objected to, to insist that that circumstance is evidence, that the fact exists as is alleged. The paper in question was not admitted by the State's counsel, because it was improper evidence. The druggist, Mr. Hinsdale himself, was in court, and the sale and delivery of the tartar emetic, I presume, could have been proved by him, if the fact were so. Why did they not examine him? They would rather depend on no proof to

establish what they regard as an important fact, than lose the reply. Taking it for granted, then, that tartar emetic was purchased, it is said that it produces the same symptoms, and gives the same results with arsenic, when subjected to the same tests, and that the physicians, with the best intentions in the world, may have been deceived. But, as tartar emetic is a compound of antimony, the observations I have already made on that substance will equally apply to this. I now, gentlemen, believe I have met and successfully answered the arguments made by the defendant's counsel to refute the correctness of the conclusion to which the physicians have come, that there was arsenic in the stomach of Alexander C. Simpson; and I have no doubt that the conviction, that he died of the effects of arsenic, administered by some one, must still remain indelibly fixed on your minds.

The only other inquiry, then, to be made is, Did the prisoner administer this poison wilfully and of her malice aforethought? And it is natural to inquire, Why should this frail woman commit such a deed? Why should she take the life of him with whom she was connected by the most sacred ties that can bind together two human hearts? Why should she forget the amiability of her nature, and the gentle offices of her sex, and become the dark assassin and murderess? Surely some great motive must be shown to have existed, operating upon her mind and impelling her conduct, like the behest of an irresistible destiny? If she had loved her husband—if she had lived on terms of harmony and affection with him—if she had entertained no guilty passion for another—if she had eschewed “evil communications,” her perpetration of this diabolical act would be so unnatural, so unaccountable, that it could only be presumed on the supposition of her insanity. Unfortunately for the prisoner, however, the State does show a motive; a motive altogether and entirely adequate to the commission of the deed—indifference, dislike, maybe disgust, for her husband, and a consuming infatuated passion for another—for one whom she loved before she married Simpson—one whom she still continues to love—one whom she

still, with all the passionate aspirations of her heart, desires to marry; and Simpson, the living Simpson, is the only barrier to the consummation of this most ardent wish of her heart. At first she probably only trusted herself to think of the death of her husband; then, perhaps, only to luxuriate her imagination in the contemplation of the felicitous consequences which might result to her fortunes from that event, and, from reflecting on it, she soon began to desire it; and from desiring it the step was but too easy to a resolution to accomplish it. Am I not borne out in this by the evidence? About a month previous to the death of Simpson, the prisoner unbosomed herself to the witness, Miss Register. Then the first act in this tragical drama began. The door, you will recollect, was locked, and a letter, which she represented as one received from her husband, was produced and read, which speaks volumes of jealousy, distrust, and connubial infelicity. "I once thought you loved me, but now I have reason to believe you love another better. For the sake of our friends, you may remain in my house, but you can no longer be my wife. Prepare me a separate bed. I will furnish you with food, but you must find your own clothes."

This is evidence of a serious disagreement; and the words, "love another better," and the demand of a separate bed, but too plainly indicate what suspicions (not to say conviction) had taken possession of poor Simpson's mind, and her own admissions to the witness show that they were but too well founded. "Mr. Simpson need not make a fool of himself now, for James has been coming to see me ever since we were married." She admitted she did not love Simpson, and only married him to get a home—that she had always loved another—was engaged to him before she married Simpson and was induced by the persuasions of her friends to reject him. Miss Register embraced the occasion to tender to the prisoner some wholesome advice. She advised her to stop her intercourse with the young gentleman; intimated to her that Simpson might some day find him in the house, and in the heat of the moment take his life. "He knows better," was the bold and menacing reply of the prisoner—a reply which clearly in-

volves a threat—a threat of revenge, which implies a full knowledge of her power and of his inability to resist. Had she then conceived the idea of taking the life of Simpson? Perhaps not yet. The books of the Sibyl, it is true, before that had been opened, but the mind of the prisoner had not yet been thoroughly corrupted by that diabolical sorceress, who by her infernal incantations, or rather wretched pretensions to divination, has wrought all this mischief and misery, has brought the unhappy Simpson to an untimely grave, and dragged down his unfortunate wife from the respectable station in society which she had occupied, to disgrace, degradation, and, may be, an ignominious end. When we see a wretch like this, imposing her infernal sorceries upon either the folly of the wicked, or the credulity of the simple, one almost regrets that the ancient mode of trial for witchcraft has passed away, with the days of barbarism. Polly Rising has already foretold that the prisoner and her husband would live together five years, when he would die (three of which had already passed), mercifully allowing poor Simpson two more years to enjoy the blessings of his conjugal relations. That divination—that “turning of the cup,” was no doubt before the serious disagreement had taken place. Mrs. Rising was not then informed of the pressing necessity of cutting still shorter the thread of poor Simpson’s life. It is true, she had predicted that the prisoner after that sad event would realize the early aspirations of her heart, but she had not then been made fully to understand the importance of a speedy consummation. Meanwhile, events progressed—the domestic breach widened—jealousy and distrust grew apace—the misunderstanding increased, until the prisoner leaves her house and is absent some two days before she returned to her husband, her home and her duty. A few days after this, she informed the witness, Miss Arey, that the misunderstanding between herself and her husband had been reconciled.

Deceitful truce! But here the curtain drops for a space, but the actors in this dark tragedy are not idle. The prisoner and Mrs. Rising saw each other frequently. In the meantime. Mrs. Rising, probably, is informed as to the true state of the

prisoner's feelings and wishes, and, after the most mature consideration and consultation on the whole matter, the Fates are induced to change their decree, and limit to a yet shorter period the brief space allotted to poor Simpson to live. Two or three weeks elapsed after the last conversation with Miss Register, and the next thing seen of the prisoner, she was in a drug store in this place purchasing arsenic (under the pretext of killing rats); and this on the Saturday before the Thursday on which Simpson died. It is not administered to rats. It was carried to her house. On the Wednesday following, an unusual dessert in that family was prepared for dinner; a tumbler of syllabub was placed at the plate of Simpson and another at her own. The two boarders, Smith and Whitfield, both belong to the order of the Sons of Temperance and of course were interdicted from eating it, as it contains wine. Simpson ate the syllabub provided for him, and asked if there was more. "No," the prisoner tells him; "but you can have mine." He ate that also. It is an article of food you will observe, gentlemen, which the boarders could not eat, which she would not eat, and which Simpson does eat. They do not sicken but Simpson sickens and dies. After dinner, on that day, we have no trace of Simpson until supper; whether he is sick previous to that time does not appear. The witness Smith tells you that when he first commenced boarding with Mr. Simpson, as Simpson drank his coffee with less sugar than he, the prisoner told him she would always give him the first cup, which she had invariably done up to that night, and on this fatal night passed him the first cup as usual, and whilst he was stirring it, and listening to a conversation between Simpson and Whitfield, his attention was attracted by the prisoner calling to him in an excited manner, and with an animated tone of voice, "Mr. Smith, Mr. Smith; that, I say, is Mr. Simpson's coffee." The cup—the cup of death as the State insists—was passed on to him, and he drank it; he ate nothing, refused another cup, and complained of being sick. The poison given in the syllabub was now perhaps just beginning to operate; or maybe the dose administered in the coffee was telling its effects forthwith on his system. On div-

ers occasions, previous to this, in the two or three weeks preceding, the prisoner had entertained herself after tea, and before the cloth was removed, by practising the cabalistic lessons which she had learned from her friend, Mrs. Rising. She had acquired, under her amiable teaching, the "black art" of "turning the cup," and looking into futurity; and whenever she did so, it was to foretell the fortune of her husband, which was pretty generally disastrous enough; it was nearly always a prediction of sickness and death.

On this very Wednesday evening, very soon after he had taken to his lips that "poisoned chalice," she proceeded to tell his fortune. She turned the cup, "You are going to be sick, Mr. Simpson—very sick. Oh! I see a sick bed and some one lying on it—a coffin—dark clouds, and a muddy road. You know, lovey, I had our fortune told some time ago, and we were to live together five years, have two children, who were to die, and a third who would live, and then you were to die, and I would marry again. Three have already past." You will observe she did not say one word about the last prediction of Mrs. Rising, that he would die in a week, which must have been then made some three or four days, she did not tell him of that, lest it might excite his suspicions when the poison should begin its ravages on his system; and yet she prophesies herself after she has got the poison safely lodged in his stomach, by way of gently intimating to him that if he should sicken and die very soon he need not be surprised at it, for she saw sickness and death in the cup. The Fates would have it so. That night (Wednesday night), at early bedtime Simpson was taken very sick—the sickness increased—there was intense burning in the pit of his stomach—nausea, vomiting and purging, and a slow, feeble pulse. The next morning a physician was called in, but he could give no relief; and on Thursday, at dinner, while the poor man was suffering the most intense agony, and when at that very moment he has arsenic in his stomach, which is preying like a consuming fire on his vitals, the prisoner inquires of Smith, what effect arsenic has on things. Now you will naturally inquire, what circumstance could have suggested arsenic to her



mind just at that juncture—whether the squeaking of some rat or the groans and anguish of her dying husband? This circumstance I admit, as also that of the coffee and syllabub, and fortune-telling, each taken in the abstract, does seem too trivial to be seriously relied on when the stake is human life—yet they are links in the chain—shreds in the cord, which taken in connection with the fact of her disagreement with her husband—with that of her loving another better—with that of her desire to marry her first lover—with that of her calm, unmoved conversation with Miss Arey, while her husband is yet a corpse—with that of her continually revolving in her mind the one all-engrossing idea of her husband's death—with that of her buying arsenic—with that of arsenic being found in the stomach of Simpson on the post-mortem examination, and finally, with the fact that he died of the effects of arsenic, become pregnant with the most vital importance; and frivolous as they may seem are important links in the great chain that binds the prisoner to this flagitious deed. The fortune-telling, the consulting the miserable old hag, the “turning the cup,” no doubt, will be attempted to be explained away, as the frivolous but innocent pastime of a silly, giddy woman. Her policy, no doubt, was to give it the pretense of an idle pastime. But it was manifestly a subject which had engaged both her head and heart—which had become the all-absorbing feeling of the one, the all-engrossing idea of the other; how to get rid of Simpson whom she did not love, and how to gratify her criminal passion for him whom she did love. An idle pastime! Was that conversation with Miss Arey immediately after the death of Simpson an idle pastime? Was that an occasion to trifle and indulge in frivolity? No, gentlemen; in the presence of the dead, we all feel an unaccountable solemnity. It is an occasion, of all others, when “Out of the fullness of the heart the mouth speaketh;” yet on this sad and solemn occasion, while the body of her husband is still warm with animation, while the disenthralled spirit still lingers over its deserted tenement, she renews her favorite theme, and with a calm voice and tearless eye, informs the witness, Miss Arey, that her fortune is

coming to pass, that she had had her fortune told about a month ago by Mrs. Rising and again at a later period by the same person, who predicted that Mr. Simpson would die in a week, and that she asked her if she would marry again, and the response was—Yes, you will marry the man who first addressed you. The time, the place, the occasion, the solemn manner in which this communication was made, prove conclusively that all that fortune-telling, prophesying, “turning of the cup,” and consultations with that woman of the “familiar spirit,” were not with her mere idle amusement to while away the dull hours of a monotonous life, but serious, sober, earnest business, in which her whole soul was engaged. The fact then, that the prisoner did not love her husband—that she loved another better—that she desired to marry another—that she had excited by her conduct her husband’s jealousy—that she had had serious domestic disagreements with him—that she had seriously consulted a would-be prophetess in regard to his death—that she desired to get rid of him to make room for another—and, above all, that after his death her conduct and language should plainly manifest a feeling of gratification at the event, is evidence, sufficient evidence, I submit, of the motive.

That she prepared an article of food which no one would or could partake of but Simpson—that she sent that cup of coffee to Simpson on Wednesday evening, and was filled for a moment with excitement and alarm lest it should be drunk by another—in fine, that they occupied the same house, the same chamber, and ate at the same table, is proof sufficient that she had ample opportunity to administer the poison.

That she purchased an ounce of arsenic, enough to destroy a hundred men, and carried it home to her house, the house where Simpson sickened and died, but a few days after, is proof sufficient, God knows, of the means of death.

That arsenic was found in the stomach of Simpson on the post-mortem examination, and that the intelligent and upright physicians who attended on him in his last illness, give it as their opinion that he died of the effects of arsenic taken into the stomach, is proof, taken in connection with the other

circumstances I have mentioned, strong, irresistable, and conclusive, that the prisoner at the bar committed this foul deed of murder, and the presumption of her guilt is the more strong, the more violent, as no motive to take Simpson's life is ascribed to any other human being. The counsel for the defense, I believe, did argue that there was as strong, nay, stronger evidence, that Simpson took his own life, than that it was taken by the prisoner. It is insisted that it was tartar emetic, which was found in his stomach, and that he had intentionally taken a large dose to destroy himself. This is an ingenious hypothesis, but only an hypothesis unsupported by the facts. It cannot stand for a moment against the direct proof of the physicians, who tell you it was arsenic found in the stomach, and not tartar emetic, not even cinnabar. They and Dr. Colton applied a variety of tests, as I have before mentioned, and they say, and are sustained by the authorities that no one substance known to chemistry will give under the application of all the chemical tests they tried the same results with arsenic. Ah! but it is said, Simpson for some time before his death was sad, dejected, dispirited, jealous and he took his own life to free himself from the cares and troubles which beset his path. Simpson take his own life? He seek the cold embrace of death? See him as he lay on that bed of suffering! See him writhing with agony and burning up with inextinguishable heat! Hear his cries for aid! Hear his pleading like a child with those about him for succor! And when he is told there is no human relief for him, hear that passionate outbreak of his alarmed conscience; "Lord Jesus Christ have mercy on me!" It was death he feared all the while. It was death he wished to avert. It was death he struggled against to the last moment of his life. Such, gentlemen, is not the conduct of one who lays violent hands on his own life. The idea is preposterous.

This prosecution, gentlemen, as you here observe, has been based entirely on circumstantial evidence. I well know the popular prejudice existing against that species of proof, and I have no doubt—a strong appeal will be made to that prejudice on this occasion—that extreme cases of unfortunate

convictions on circumstantial evidence will be read in your hearing, to startle your imaginations and alarm your consciences. The State, gentlemen, against such *ad capitandum* arguments, trusts in your good sense. We are all human beings, under human institutions, and to attain the truth of a fact within human knowledge, we must depend on human testimony, deceptive as it may be, corrupt, as it is often, and fallable, as it is always. If we reject that kind of human evidence called circumstantial (which, after all, is based upon the testimony of witnesses), because innocent persons have been convicted on such testimony, for a like reason, we ought to reject direct proof, because innocent persons have been improperly convicted upon the testimony of corrupt and perjured witnesses. Fallible creatures as we are, we must rely upon such testimony, fallible as it is, else three-fourths of the felons in the land, would go "unwhipped of justice."

Before I conclude, gentlemen, I will beg leave to revert to some remarks, which have fallen from my friend, Mr. McRae, reflecting on the conduct of my associate counsel and myself. It is said, we would not consent to a separation of the witnesses. This, gentlemen, is altogether a mistake, except as to the single instance of Dr. Colton. You well know, gentlemen, that the State's counsel most cheerfully acceded to the proposition to separate the witnesses, only we begged that the Rev. Dr. Colton might remain to hear Dr. Robinson examined as to certain experiments which he had performed in the absence of Dr. Colton, and about which we wished to ask the latter gentleman some questions. Dr. Colton could not otherwise have been examined by us as to those experiments. It is also said we did not examine all the witnesses endorsed on the bill. It is true we did not, nor do the laws of the State require it. Each witness, however, was tendered by us; why did they not examine them? They knew what each would prove.

As I am to be followed by other counsel on the side of the State, I shall trespass on your patience no further.

And I now commit, so far as I am concerned, gentlemen,

the cause of the State into your hands, feeling fully assured that you will do even-handed justice between the State and the prisoner whom you have in charge. Yonder figure on the wall is a fit and beautiful emblem of that justice which should be administered in this hall today. Calm, sedate, benevolent, yet firm, high above her head with one hand she holds the impartial balance; with the other the sword. That balance you now hold; that sword his Honor holds, wherewith to strike or spare, as you may by your verdict direct.

MR. WINSLOW, FOR THE PRISONER.

*Mr. Warren Winslow.* Gentlemen of the jury: In the performance of no duty in the course of my life have I felt so much oppressed with responsibility as upon this sad and solemn occasion. I have no doubt, gentlemen, you feel fully the weight of your own share of it. No more painful duty could have been imposed upon you by your country. It is, at all times, a most responsible thing for an advocate to defend a capital felony. It is at all times, and under all circumstances a fearful thing for jurors to be called upon to pass upon that which may affect the life of a fellow-being. It is, at all times an awful thing to answer an accusation of homicide, committed even upon the person of one indifferent to the perpetrator whether it be occasioned by passion, properly excited, and unduly controlled, or by that malice, which in the language of the law, proceeds from a heart fatally bent upon mischief and totally regardless of social feeling.

How much more responsible is our present position! For the present is a graver and weightier matter. The picture which the State would present to you is of a darker and more sombre hue. The offense imputed stands first upon the roll and catalogue of crimes.

A wife is arraigned to answer to the accusation of the foul and unnatural murder of her husband; charged with the cold destitution of all the finer feelings of our nature—a woman's nature; with the hellish and fiend-like spirit which would prompt her, under the guise of love to extend the poisoned

chalice to him, to whom all her affections were pledged, all of her obedience due, and upon whom, all her hopes of human happiness ought to have been centered. A crime so monstrous, so revolting, so unnatural, that one is tempted to pronounce its impossibility. A crime so incredible that like parricide among the Athenians, our language lacks a technical word by which it may be expressed.

Instances like the present may have occurred in other lands, doubtless they have, since we have records of them; but, thank God, hitherto in North Carolina, as Mr. Solicitor declared in the opening of this case, hitherto in North Carolina, the land of morality, whose whole scope of country is dotted with the temples of a pure religion, whose thousand spires shoot to Heaven, hitherto it has been accused against no one.

But, gentlemen, such is the mysterious action of the human heart, so does it crave after the wonderful, the horrible, and the marvelous that the bare accusation of crime frequently engenders credence in the breast of man.

“On eagle wings immortal scandal flies.”

Individuals are never wanting to pander to the curiosity and morbid feelings of the public; and the more heinous the accusation, the more strongly and tenaciously does belief fix and fasten and entwine itself about the fibres of the human heart.

This infirmity and proclivity of our nature was known to our Saxon forefathers. Accordingly, the law, departing from the precedents of every other people, permits not a magistrate accustomed to judge by opinion, and who, by his habit of life, is constantly seeking for proof of guilt, and submitting everything to the test of a severe and inflexible logic to decide upon the fact of guilt or innocence; nor does the law trust the great body of the people, the inconstant masses, easily moved by prejudice and swayed by passion, to pass upon the issues of life or death.

These momentous trusts she commits to a portion of the people, a small body selected by lot. Untechnical minds, she associates with them a legal mind to guide and direct their in-

vestigations; she binds them by a solemn obligation truly to try, and true deliverance make. But while she teaches them to suppress passion, and to discard prejudice, she, in her benignity, forbids not the indulgence of human sympathies and human feelings.

Into this responsible trust you have been sworn. You are men, holding in your hands, for a brief season, the awful attribute of omnipotence, power over life; and you sit there to judge a fellow-being alike frail with yourselves; a being of the gentler sex, the fresh flowers of whose young life are blasted, whatever may be the destiny your verdict shall mark out for her.

We are here to defend her; you are here to judge. Our province is to insist upon, and to maintain to the best of our abilities, and at all hazards her legal rights; it is yours to pass upon her guilt or innocence. We have but one narrow path to tread; deviation from that will lead us into error, and error, with us is irremediable. You may err, but if you do, it must be on the side of mercy. You are not here to yield to passion or to prejudice; nor lightly nor idly to trifle with human life. You are not here to give shape and form, and substance to weak suspicion, nor far-fetched conjecture. You are here to pass upon legal guilt, under legal forms and legal usages.

I pray you, then, to approach this case, so important in its results, with calmness indeed, but not with stoical indifference. Approach it with minds soaring far above all bias, and rising superior to all prejudice; yet with hearts quick with the sympathies of our nature. The law forbids not the indulgence of such feelings.

“Ye are not wood, ye are not stones, but men!”

We indeed seek not to excite you, nor to mislead your judgments. Vain would be the expectation were it entertained. We shall address you in the language of soberness and of truth; and we flatter ourselves, should we command your favorable attention, we shall persuade you, that viewing this case in its worst aspect, your minds cannot be brought to that



state of conviction, which only will warrant a verdict of guilty.

I am instructed by my unhappy client, in the presence of God and this assembly, to declare her entire innocence of the horrible crime imputed to her; to assert the utter incapability of her nature to have planned or perpetrated it, and her firm reliance upon your just judgment, for her safety and vindication.

Giddy and thoughtless, and volatile and indiscreet she may have been; errors of youth, and of temperament which the cold and selfish purist, and the canting hypocrite may frown upon; but which the philanthropist may view with regret, and excuse, and the Christian contemplate with sorrow and pardon.

Gentlemen, the propositions which the State submits to you, and which the prosecution is bound to prove to you beyond a reasonable doubt, lie within a narrow compass. Circumstances indeed cluster around them, but they are to be viewed only as they bear upon the issue. The crime charged is murder. There is no middle ground in this accusation. The prisoner is guilty of wilful and deliberate murder, or she is innocent. The prosecution must establish the *corpus delicti*, or body of the offense and the criminal agency of my client in its production.

To enable jurors safely to arrive at a conclusion, the text writers lay down certain rules for their guidance. It is said that the onus of proving everything essential to the charge, rests wholly upon the prosecution; that the proof of the *corpus delicti* must be clear, unequivocal, and free from doubt; that the evidence against the accused must amount to certainty, and exclude every other hypothesis, but that of the guilt of the prisoner; that the hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all; and that presumptive proof ought never to be relied on when direct evidence is withheld.

These rules are approved by the ablest judicial writers; have received the sanction of the highest judicial authority,

and commend themselves to the common sense of every sincere inquirer after truth. When the facts and circumstances deposed to fail to produce conviction, there results that other great rule of criminal law, in cases of doubt it is safer to acquit than to condemn.

I shall come to the discussion of the two great propositions submitted, with these rules for our guidance, and I shall endeavor to show that they will be violated by a conviction of the prisoner; that there is no clear and unequivocal proof of the *corpus delicti*; that there are hypotheses to account for the death of the deceased, as probable as that of his death by poison administered by the hand of the prisoner; and that, in seeking to assign a motive for the perpetration of the crime, you are asked by the prosecution to draw conclusions from presumptions, when, if the motive existed, direct proof must have been attainable.

First, gentlemen, has the offense charged been committed? Not that this Alexander C. Simpson is dead. Ah! that is unfortunately too true. But did he come to his death by the criminal agency of another? What caused his death? The prosecution would have you believe that he was poisoned by arsenic. This then constitutes the first inquiry. For if he died not of the effects of arsenic—it is not pretended any other poison was administered to him—the charge falls to the ground. It is said that he so died upon the authority of the physicians and of Dr. Colton. I know the respectable gentlemen, Drs. Benjamin W. Robinson and Mallett. In the purity of their motives, and the integrity of their characters, no one has more implicit confidence than I have. I respect their professional skill. I do not undervalue their scientific attainments. But they are not professed chemists, and will hardly aspire to be designated as experts in that experimental science. Dr. Mallett was the attending physician. The admirable manner in which he acquitted himself on the witness stand elicits applause. The clearness and perspicuity of his testimony gives promise of future usefulness; and the reputation here acquired, will, undoubtedly, lead him to the hon-

ors, as I trust it will, to the profits of his profession. I do not dispare my learned friends when I assert that they are not practical chemists; and, I may be permitted to say, without giving offense, that the calling in Dr. Colton before the inquest, exhibited on the part of my learned friends a proper and becoming want of confidence in their own conclusions.

I have the right to presume that if they had been satisfied with the results of their own analysis, beyond a doubt, they would have sought aid from no quarter, but would boldly have pronounced opinions honestly formed. Having sought aid, I am authorized to conclude that they were not confident. What then did the reverend chemist do to remove their doubts or strengthen their opinions? Nothing! literally nothing. His experiments were but repetitions of those of my learned friends. He himself declares to you, that he remarked to the physicians concerned in the examination that the only ground of absolute certainty was the reduction of the oxide of arsenic, if found, to the metallic state, and that all the other tests amounted to a probability; yet, with a strange inconsistency, he declares that the results of the experiments conducted by him, furnish conclusive proof of the existence of the oxide of arsenic in the suspected fluid; and he adds that the reduction of the metal itself would have rendered the evidence only somewhat stronger.

I have only therefore to cite Dr. Colton against himself to show that his conclusions are entitled to no more weight, nay, not so much as those of my learned friends.

All the authorities support Dr. Colton in the position that the reduction test, as it is called, is the only reliable and conclusive one. "No one conversant with the subject will deny," says Beck (*Med. Jur.*, 393), "that reduction is the confirmatory, the decisive proof." "The only thing to be relied on in the opinion of the best chemists," says Dr. MacNeven, "is the exhibition of the metal itself in its metallic lustre." (*Trial of Kessler*, 1 *Am. Med. Rec.*, 386.) "Great doubts hang over every other test, the sublimed metal excepted," says Dr. Cooper. (*Med. Jur.*, 439.) "Before a Court or jury," says

Siliman (Glem. of Chem., 192), "nothing ought, or will prevail for the condemnation of an accused person, short of the production of the metal itself." And to the same effect are all the books.

But Dr. Colton bases his conclusions upon the results of the liquid tests and the production of the precipitates of colors, known as canary-yellow, brick-red, blackish-blue and apple-green. Very delicate shades! and the life of my client is asked at your hands because Dr. Colton is enabled to testify to such minute shades of difference in color as those aforesaid, canary-yellow, brick-red, blackish-blue and apple-green. *Ne crede mimium colori!* Gentlemen, trust not too much to color.

But to this is to be added the garlic odor or alliaceous smell, the result of the third experiment, which Dr. Colton observed, notwithstanding his olfactory nerves, have lost so much of their action, that unless an odor be pungent he cannot perceive it.

In a capital case jurors should no more convict upon a peculiar smell than upon a shade of color.

I do not mean to weary you, gentlemen, by a minute and critical examination of the liquid tests as conducted and testified to: that has been ably done by my associate, and his ingenious argument remains unanswered. I will content myself with a reference to one or more additional authorities. "The alliaceous smell alone cannot be relied on," says Dr. MacNeven (*ubi supra*), "for hydrogen gas burns with a faint smell of arsenic. Phosphorous and zinc under the same circumstances burn with a similar odor." (7 Ed. Med and Sur. Journal, 85.) "Animal matter and even paper will imitate it." (Christison, 237.) The same uncertainty hangs about the liquid tests used. In the first experiment, carbonate of potassa was dissolved in the suspected fluid, and to that solution was added the ammonical sulphate of copper, and the result was a green precipitate; but the same agents with some animal and vegetable substances give a green color similar to Sheele's green, although no arsenic be present.

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(Silliman, *St. of Chem.*, 194), and a strong infusion of onions will produce the same results. (Murray's *St. of Chem.*, 243.)

The nitrate of silver test is liable to many ambiguities. Phosphoric acid occasions a precipitate of the same color, and Brande says, that in a case of importance no reliance can be placed upon it. The test by sulphuretted hydrogen is also ambiguous from similarity in color with other metallic precipitates, and from impurity of the gas. (Cooper *Med. Jur.*, 439.)

I might go on, gentlemen, in the same manner with all the other tests and experiments, but it would be but a repetition of what has been already stated, and more ably than I could do it by my associate.

Dr. Robinson adds that in and about the erosions of the stomach were shining vitreous particles, which he took to be particles of the oxide of arsenic, and which were subjected to the same tests, as were the contents of the stomach and with the same results. But these experiments prove no more than in the principal case; and there is also ambiguity, as to the particles themselves. "I deem it extremely difficult, if not impossible," says Dr. MacNeven, in his criticisms on the scientific testimony in Kessler's case, "to distinguish, with certainty, any white mineral powder from another, under such circumstances." And Orfila observes that "the mucous membrane of the stomach under certain circumstances is lined with a number of brilliant points, composed of fat and albumen, the frame of which decrepitate on drying, and produce a noise and exhale an odor of burned animal matter: they are met with in the bodies of persons not poisoned, and require attentive examination to distinguish them from arsenious acid." (*Dict. de Med.*, Art. "Arsenic.")

Dr. Robinson testifies that judging from the symptoms only as detailed by the attending physician, he could not say there was arsenic present; and it is laid down in all the books that reliance cannot be placed upon the symptoms without proof of the exhibition of the poison.

Up to the time of the second analysis, therefore, I think, I have shown doubt exists too strong to be disregarded. Were they removed? An attempt was made to carry out the reduction test. I shall not remark upon it; I shall leave you with what my associate has said upon that point; he has shown that what was done was inconclusive and unsatisfactory.

But, gentlemen, the suspected fluid, the contents of the stomach, had remained in a chamber in Dr. Robinson's office for a twelvemonth. There is no evidence that the chamber was locked; there is no evidence that access was not had to it by any one who chose to visit there. The doctor enjoys a practice perhaps as extensive as that of any physician in the State, and his office, ordinarily, is thronged. If proof could have been made that the suspected fluid had been carefully kept under lock and key think you my learned friends on the other side would have neglected to produce it? You are called on, however, in a case affecting the prisoner's life, to presume everything against her.

But, gentlemen, I submit that there is evidence that the death was not produced by arsenic. The charge is that the arsenic was administered in syllabub at dinner. The deceased exhibited no nausea until in the evening after tea. There was no proof that he was sick in the afternoon: had he been sick proof would have been offered. That which the prosecution have not done, rely upon it, they could not do. On the other hand, there is evidence that he was well. The witness Smith saw him walking in the afternoon and Dr. Mallett cannot distinctly say whether it was upon that or the preceding evening he met him walking with the prisoner. He did not complain to any one that he had been sick or vomiting in the afternoon. According to all the authorities, nausea and vomiting follow the exhibition of this deadly poison within the hour. This is the general rule; there are exceptions, but the excepted cases are those in which sleep has supervened. But it was said poison was administered at tea-time in the coffee. Dr. Robinson gives it as his opinion that there

was a considerable portion of arsenic in the stomach, certainly three grains. This is a fatal quantity, and must have produced an illness much more serious than that under which the unfortunate man labored that night. At the morning visit, the attending physician and the witness Smith depose that they did not consider him very sick. Had he taken that evening that quantity of arsenic, I submit the symptoms would have been more formidable, and the consequent illness instead of being light and not such as to excite the fears of his medical advisor would have been unto death. I submit that reviewing the whole matter, the proof of the *corpus delicti* is equivocal and not free from doubt.

At the first analysis those respectable physicians, Drs. Gilliam and McRae aided; Mr. Samuel J. Hinsdale, a practical chemist of known reputation in his line assisted in the second series of experiments. All these gentlemen are under subpoena, have been in attendance and have not been produced. You had a right to demand the examination of every one who could shed light upon the first point. They were not produced. It is a fair inference that they would have been examined if their testimony would have corroborated that of their fellows. You have a right to presume that direct testimony has been withheld, and this presumption adds to the doubts. To clear up any doubts upon the presence of arsenic in the suspected fluid (the contents of the stomach), my learned friends upon the other side might have caused the reduction test to have been carried on before you. They have not done so and the prisoner is entitled to all the presumptions naturally flowing from the omission.

But gentlemen, conceding that there was arsenic in the stomach, a more important inquiry remains. The prosecution must show that it came there by the criminal agency of another. I submit that there are facts and circumstances from which presumptions may be drawn to favor the idea that arsenic was present by other means than a criminal agency.

Arsenic is among the most deadly of the irritant poisons.



Two grains, according to Hahnemann, produce death. A grain dissolved in wine was known to have affected all who partook of it with severe effects, although taken after dinner. According to Lachese, one-eighth of a grain taken by a healthy adult may prove injurious, doses of a quarter to half a grain may induce symptoms of poisoning, and one to two grains may cause death. (17 Ann de Hygiene, 350.) Disorders of the stomach may be produced by small doses and often prove of long continuance. A lady who took arsenic had not recovered of the effects, says Dr. Elliotson, after ten years. (9 London Med. and Surg. Journal, 275.)

Applied externally to a wound, or an ulcer, or even to the skin, it often proves fatal, and exhibits frequently the same symptoms and produces the same results as if taken internally. (Orfila Toxic., 514.) In this way, various quack preparations, and certain pastes, such as the French Paté Arsenicale, Plunkett's Ointment, and Davidson's Cancer-Plaster, which have arsenic for their bases, may prove dangerous and fatal. Nay, the inhaling the vapors produce very hurtful consequences. I wonder my learned friends suffered no inconvenience during their experiments at sublimation. So fatal are the effects of the vapors of arsenic, that in Bohemia, where the cobalt is roasted, formerly none but convicts under sentence of death were put to work at the mines; and in the liturgy of all the churches a prayer was always put up,—God save the miners from arsenic and spirits. Among the effects of death by arsenic, in this manner, are inflammations of the inner coat of the stomach, and erosions, and perforations.

Now, gentlemen, it is in proof before you that the deceased was in weak health. He may have taken some internal remedy, such as Fowler's Solution, which is known to contain arsenic. He had been afflicted with a scrofulous disorder; there were scrofulous eruptions on his head and body during the summer. The State has not attempted to prove his recovery of that disease. Intending to take sulphur, for the cutaneous eruptions, he may have taken orpiment, a pigment used for painting chariots, now measurably superseded by chrome

yellow. Orpiment and the flowers of sulphur resemble each other, and Dr. Colton has testified to a fatal mistake between them which came under his knowledge. He may have resorted, as an external remedy, to some of those quack preparations known to contain arsenic. The application of those substances to some external sore would have produced the unfortunate result of his death. Iodide of arsenic is a remedy frequently exhibited in scrofulous complaints. He may have resorted to that medicine. There was wine in the syllabub he ate at dinner. Wine sometimes contains arsenious acid; Orfila gives minute directions for its detection.

How many recollections of accidental poisoning rise fresh before our memories. On the very day the inquest returned their verdict, the *National Intelligencer* contained an account of some children poisoned in Pennsylvania from eating confectioner's candy; some preparation of arsenic having been used to form the pigment with which it was colored. During the same week, while this Court was sitting, a whole family, residing at Massey's, in this town, were poisoned in some unknown way and, though no death occurred, some ten or twelve persons suffered severely from the effects. The symptoms were similar to those the deceased exhibited, and although the chemist detected no arsenic in the vomit, a respectable and distinguished physician declared his belief that the poison was arsenic. At a public dinner, in this place, some years ago, numbers of persons who ate of the syllabub prepared were severely affected and one died, the result of some deleterious substance in the wine, of which the syllabub was composed; and this incident might have furnished the witness, Smith, with a plausible reason why the Sons of Temperance put syllabub under the ban.

Arsenic may have been present in the remedies prescribed by the physician during the indisposition of the deceased. The adulteration of drugs is carried to a fearful extent, and physicians tell you they know not what they are giving when they prescribe. The strong arm of Government has been provoked to stay this growing evil. The deceased had taken

cherry bitters. What other patent medicines and quack preparations, with which, in this age of humbug, the world is flooded, had he taken! It would have been an interesting matter, had it occurred to us, to have examined, my learned friends, the physicians upon this point. They could have eloquently told us of the fearful risks poor suffering humanity runs from these patent remedies and quack preparations, warranted to cure all the ills that flesh is heir to.

The very vessels used to hold the contents of the stomach, the test tubes, nay, the tests themselves, may have contained arsenic. In certain kinds of glass, arsenic is used to make the glass clear and vitreous; when in excess, it produces that milky appearance which we see in some of the ornamental glass-work. If an alkali be in excess, the arsenic becomes soluble, by the addition of an acid.

Dr. Mallett says the contents of the stomach were first placed in a clean vessel. Aside from this, there is no evidence whatever to show that the other vessels were cleansed. This, too, was upon the occasion of the first analysis. It has not been proved what kind or quality of vessels were used at the experiments conducted last week, whether clean or unclean, cleansed or uncleansed. You will be asked to presume everything, by the prosecution.

Gentlemen, the prosecution, fully aware that to establish so horrible a crime as this imputed to the prisoner, credulity itself would demand a plausible motive, seek to establish one, by persuading you that the prisoner was a wanton, unfaithful to the marriage vow, and loved another than her husband. We shall presently see that no satisfactory proof thereof has been adduced. Taking, however, the declaration of the State to be true, broad as it was made by the Solicitor in his opening remarks, it furnishes also a motive, sufficiently strong, to favor the hypothesis which my associate has discussed, and to which I shall content myself with alluding. I mean the death of the prisoner, by suicide. I repeat, if these facts can be assigned as a motive for this crime, if the wife so loathed the husband as to be induced to resort to violent means of

separation, if she were so wanton in her desires and illicit loves as to have persuaded herself to march up to their indulgence by trampling under foot every obligation, human and divine, and by the infraction of that solemn commandment of her God, "thou shalt do no murder," the existence of such feelings and impulses in her mind, her every conduct, at least to some extent, might have operated in prompting the unhappy husband to commit suicide. And this consideration will derive strength, or exhibit weakness, according as the circumstances implicating the prisoner, presently to be discussed, are strong or weak. There being, then, so many hypotheses, which may be assumed, to exclude the hypothesis of the prisoner's guilt of the crime imputed to her, I think you cannot be warranted in returning a verdict of guilty. We are still left in doubt as to the establishment of the *corpus delicti*. If you are not morally convinced of it, as reasonable men, beyond reasonable doubt, you must acquit. For in cases of doubt it is safer to acquit than to condemn.

But, gentlemen, suppose it be conceded, for the sake of argument, that the deceased died of arsenic, and that the arsenic was criminally administered to him, which we deny to be proved, we are brought to the second great proposition: Was it administered by the prisoner?

And here there is no field for suspicion nor conjecture. You must require stronger proof than would avail to establish the first proposition. Weaker doubts will suffice to authorize an acquittal. The issue is one of life. Shall this weeping girl receive judgment to die?

Proof!—give us proof! must be your stern demand of the prosecution. I shall not go into a critical analysis of the testimony of each particular witness. I shall take, as true, everything sworn to, save perhaps the evidence of that abandoned woman, Butler; nay, her testimony may be admitted, with all the force with which my learned friend, who is to follow me, may choose to invest it, and I think even then I can triumphantly demand of you the acquittal of my client.

I take it for granted that the State has brought every fact

that can implicate the prisoner. Active men have stood behind the Solicitor's chair to aid this prosecution. The purlieus of the town have been ransacked, the sinks of wretchedness and the abodes of want; witnesses have been called from thence, sworn and tendered, none of whom, save this Mrs. Butler, have the prosecution examined. I shall not speak of her, my learned friend will hardly press her testimony upon you; she is known to jurors; little value must one affix to human life who would stake its continuance upon the word of such a witness.

Trifling circumstances have been gathered together, and my learned friend will eloquently comment upon them, roll them into one dark mass, and tell you that the charge has been proved to a mathematical demonstration—that will be the word. Let us pause to examine them in detail, let us see how far they are dependent or independent; for circumstantial testimony gathers force or exhibits weakness as each particular fact is independent or dependent.

I admit that a number of independent circumstances, all pointing to the same conclusion, strengthens the probability of such conclusion. But when the circumstances flow naturally the one from the other, such probability is, if not weakened, surely not strengthened. Jurors are not called upon to strain at every insignificant circumstance, and to endeavor to bend it in a direction to support a particular hypothesis. Every circumstance adduced here by the Government, as presumptive of the prisoner's guilt, may consist with presumption of her innocence. I do not mean to say that in every case the presumption will be equally strong.

When a crime like this is accused against any one, we instinctively inquire into the means and the motive. The means, the State tells you, have been proved; the prisoner purchased arsenic at Hinsdale's on the 3rd of November. I allude to this matter now as illustrating what I have said of the nature and force of circumstantial testimony. Well, it is admitted she did purchase arsenic; but she purchased it in open day. James Butler was with her in the shop at the time of the

purchase. She conversed with him, she did not disguise her errand, she declared that she purchased it for the purpose of poisoning some of the rats with which the house was infested. Before the inquest, her aunt, James Butler's mother, stated she had immediately informed her of the fact, and was advised by her to throw it away, its danger was pointed out to her. The prisoner has not had the benefit of the testimony of these witnesses. Although their names are upon the back of the bill, they have not been called, and I am not allowed to speak of what they heretofore testified to. This circumstance is relied on by the State as the first step towards a proof of the prisoner's guilt. Now, I put it to you if a purchase so public is at all consistent with a settled design to perpetrate such a crime. If she had formed, deliberately, the purpose of making away with her husband, by means so foul, so likely to be detected, think you that she could not have effectually furthered her guilty intention without danger of exposure? She might have employed a servant, who could not have been called against her. If the woman Rising were vile enough to have counseled her to such an act, she would have been artful enough to have procured for her the poison, without a committal of either. Such conduct is not consistent with guilt; there was nothing in her manner to excite suspicion, her course was frank and open, there was no whispered order, she sought not concealment.

But it is said that on the day upon which the deceased died she asked, at dinner, of the witness Smith, the effects of arsenic upon rats; and this circumstance, in connection with the purchase, is appealed to as evidence of guilt. I may be permitted to say, that, before the inquest, Whitfield, the other individual who was of the dinner party, stated such conversation to have occurred the week previous. He has not been produced before you. Mr. Smith may be in error as to the time of this conversation. Certainly, if it occurred the week before, very little stress can be put upon it. Taking it as having happened upon both occasions, and giving the State the full benefit of that admission, there is nothing in it. Take

it in connection with the purchase—and what more natural? She had purchased arsenic to poison rats; her aunt had cautioned her against the use of it; she said she had put it in the sand; was it not natural to speak of it, and inquire more particularly as to its effects? When told by Mr. Smith that the red arsenic made the rats run to the fire, and the white arsenic made them take to the water, is it at all unnatural that, struck with such curious and singular effects, she should speak of it more than once? Had she designed the death of her husband, she would not have alluded to the subject. It is the part of guilt to seek concealment. So far from this circumstance proving guilt, it vouches for innocence. It will be said, that, at the time of the last conversation, her husband was stretched upon a bed of sickness, and such light conversation, as the fact of the purchase of arsenic, its effects upon animals, and the matter of the fortune-telling, indicate a callous heart, closed to the sympathies of our nature. Grant the conclusion! Will it warrant you to find her guilty of a capital charge? The accusation against her is not a want of feeling, but a criminal purpose; the one may well exist without the other. At that time, also, you will remember, gentlemen, the symptoms had not put on a fatal appearance; there was nothing, in the judgment of the physician, and the witness Smith, indicating dissolution. And, if it were otherwise, the worst construction to be placed upon her conduct is that it was the conduct of a silly girl, destitute of sensibility.

We come now to consider the circumstances attending the fatal illness of the deceased: When he was taken sick, I pray you to point out any act of hers indicating guilt. She does not disguise his illness. She invites to his chamber the inmates of his house; access is invited, not denied. She sends promptly for a physician, she watches over the sick-bed, ushers his friends into his room, exhibits emotion when he speaks of death, prays him not to speak thus, and in no particular is wanting in duty or apparent affection.

When he grows ill, on the evening of that, for whom does she send for succor and sympathy? For one unfriendly to



her. Are all these facts consistent with a guilty design? would it have been the part of a murderess to have invited, the friends of the deceased, and her own enemies around the sick bed of her victim, to spy upon her conduct, and scan her every act, if not with malice, perhaps without extenuation? Would she have so promptly called in a physician, whose suspicions the symptoms might arouse, and whose jealous eye might detect the causes of a death she was so much concerned to conceal. Can you conceive of a more apparent act of folly? Do not these facts go far to remove the suspicion that she had purchased the arsenic with a guilty intent? But it will be said, on the other hand, that all this serves to show guilt of a deeper dye; that this apparent frankness was but assumed to cover her artifice from detection; that her intention was, if suspicion were aroused, to rely upon the openness of her conduct to repel the presumption of her guilt. Gentlemen, such horrible depravity is altogether incredible and passes belief; that one so young, so inexperienced, should so suddenly have become depraved! Guilt never suddenly overthrows the fabric of virtue; it makes its inroads by slow and gradual approaches, and undermines rather than storms.

But her deportment when the post-mortem examination was proposed to her, is altogether inconsistent with a plan so settled. Would she not then have awakened to a sense of her danger, and resorted to all those arts, which woman so well can yield, to prevent, the dissection? This she might have done without suspicion. Any of us, all of us, would have felt a loathing repugnance to have had the remains of one dear to us, and beloved by us, mutilated by the surgeon's dissecting knife. When it is proposed to her, does she hesitate? "She exhibited," says Dr. Mallett, "no more, nor less repugnance than I should have expected from any wife." She inquired why it should be done. "For my satisfaction," replied the doctor, "to ascertain the cause of death." Think you, gentlemen, if she had been guilty of this horrible crime she then would have exhibited no emotion? Think you, she would not have refused an examination that might lead to her detec-

tion? Yet her conduct was in no wise suspicious; she replied, "If Dr. Robinson and you think it important, I will interpose no objection." And yet all her acts, consistent with the character of a young and unsuspecting girl, are tortured into circumstances of deadly dye against her.

Now, gentlemen, this is a simple narrative of the facts attending the death of Simpson. In themselves there is certainly nothing to bring the minds of jurors to a conviction of the guilt of the person, who, of all others, was most interested in his living. You are told she married him for a home, and she is represented as doing a deed, the effect of which was to deprive herself of that home she had sought to acquire. She purchased arsenic, declares it was purchased to destroy vermin, is advised against the use of it, declares she has thrown it away, speaks of it openly, her husband is taken sick, she calls in a physician, invites his friends around him, ministers to his wants, weeps when he grows ill, and when it is evident that the angel of death is hovering over his couch, ready for his victim, calls to her aid one who is unfriendly with her, and therefore prepared to judge her with bias, conceals nothing, and when dissection is proposed to her, yields to the wishes of her medical adviser, with commendable propriety, betrays no emotion of guilt, nor of contrition, and all this, perfectly and naturally consistent with unsuspecting innocence, furnishes the prosecution with arguments to prove her guilty. Upon this testimony could you hesitate as to her acquittal?

But the prosecution, aware of the bareness of the picture, seek to fill up its outlines and bring forward other circumstances to give it shade and coloring.

It is said that there was a circumstance in the conduct of the prisoner during the fatal sickness pregnant with suspicion, and this was brought forward with such ostentatious parade, that before it was developed we trembled for the result. Dr. Mallett was asked with an air, if he had noticed anything suspicious in the prisoner's manner or conduct during his last interview, and he replied that his attention was

merely drawn to an incident to which he, at the time, attached no importance. And it was merely this: when the deceased was very sick, the prisoner placed her hand upon his brow, and he moved his head immediately to one side, and she said, "You are a touch-me-not." And to this incident the Solicitor attaches great importance! To which part of it, gentlemen? to the petulant moving of the deceased's head? or to the insignificant reply of the prisoner? It is argued from this that the deceased was offended with his wife, and that it is to be hence inferred that his suspicions against her were aroused? If so, as we shall presently see, it is the only incident in the strange drama, which would lead a fair mind to such conclusion. Or would they have you infer from their reply, such a want of feeling as would make the presumption of her guilt a natural presumption. Make the most of it, such would be a strained inference. A wife places her hand upon the brow of a sick husband; the sick man is suffering from that most painful of all symptoms, nausea—that sea-sickness from which is derived the technical name—and he exhibits petulance and irritability, and you are called upon to note it as a circumstance indicative of his suspicions of her guilt. She makes a light and thoughtless reply, which, construed in its worst aspect, exhibits want of sensibility, and you are called upon to convict her of a horrible murder.

Gentlemen, there is hardly as much force in this testimony as in that fateful letter of Mr. Pickwick, which in *Bardell v. Pickwick*, Mr. Sergeant Buzfuz tortured into a strong circumstance against the defendant. "Garraway's twelve o'clock,—Dear Mrs. B—— Chops and tomato sauce. Yours, Pickwick." The husband, suffering from nausea, petulantly moves his head, and the wife thoughtlessly cries, "You are a touch-me-not!"

Gentlemen, this might furnish ingenious counsel with a subject for declamation, in a civil cause; it will hardly warrant a capital conviction.

As little stress can be laid upon the matters of the syllabub and coffee. The State points to these occasions as the oppor-

tunities she enjoyed to perpetrate the crime. I have shown that arsenic could not have been administered in the syllabub, for that sickness did not supervene during the afternoon; and the affair of the coffee is too trivial and insignificant to dwell upon. Simpson, and the witness, Smith, drank their coffee of different degrees of sweetness, and of strength, and usually there were two pots of coffee prepared; that evening there was but one. The cup designed for the deceased was handed to Smith; she called to him in an animated tone, "Mr. Smith, I say that is Mr. Simpson's cup," and the witness adds he supposed she had remarked it to him before, but in a tone so low that he probably had not heard her. Such mistakes had previously happened.

The only remaining circumstance of suspicion, anterior to the death of the deceased, is the matter of the fortune-telling, and about this, what I have said as to the other facts applies with equal strength. Such conduct is wholly inconsistent with the artful guilt, which the State seeks to fasten upon her. Can you imagine supreamer folly, than for one who had imagined, and was about to compass the death of her husband, and that by such horrid means, to volunteer, in advance, testimony against herself—repeatedly to declare what, thereafter, would inevitably be connected with his death, under the circumstances with which it was to occur? To one conversant with human nature, who knows how large a portion of the world is yet swayed by superstition—who feels the irresistible propensity of most minds to pry into the mysteries, and lift the veil of futurity—who is aware how many confide in the idle predictions of artful persons, who pretend to cast nativities and foretell events, it will not appear strange that a silly girl should resort to a sillier old woman, to have her fortune told; and when told, it would be strange indeed, if she spoke not of it. But strange, passing strange, would it indeed be, if a jury of the country, upon such a circumstance, should pronounce her guilty of a horrid murder.

Your attention has been called to her conduct after the death, as detailed by Miss Arey. They repaired from the

sick man's room to a chamber. She then told Miss Arey it had been predicted to her, that her husband would die, and it had come to pass. "There was not," said Miss Arey, "a tear in her eye;" and this the prosecution say is conclusive of her guilt. Gentlemen, if the prosecution is to be believed, this unhappy girl is the most artful and hardened of culprits. Every circumstance of her conduct throughout this whole affair, admits of one of two constructions; her entire innocence, or an artfulness of nature, and a guilt so deadly, as to be almost incredible. If she were the artful person the prosecution would have you believe, what would have been her conduct with Miss Arey? She knew her to be unfriendly with her. It would not have been a difficult task to have counterfeited sorrow; tears, feigned tears, might have flowed at her bidding. It is inconsistent with the hypothesis of the guilt of one alleged to have been so artful, to have pursued just such a line of conduct as would inevitably have aroused suspicion. Miss Arey may have mistaken what was said about the fortune-telling. I am instructed to say that she did. But if this be not so, she herself had told her husband of the prediction. When the seeming prediction was fulfilled, was it unnatural that her mind should recur to it?

There was not a tear in her eye! Ah! it is not alone

"The fruitful river in the eye"

that betokens sorrow,

"There is sometimes that within, that passeth show."

But, gentlemen, allow me to ask you what long ago you must have asked yourselves, what motive existed to prompt the prisoner to commit this crime? The State has signally failed to show one. The Solicitor, in his opening, declared he was instructed to say that circumstances would be proved before you, which would convince you that an improper intimacy existed between her and an individual he named; and this, he said, would furnish a motive. He failed to prove what he was instructed to say he could prove, and the whole charge rests alone upon the testimony of Miss Register, the

seamstress, who was in the prisoner's employ. If any proof were wanting of the thoughtless, childish and unsuspecting nature of the prisoner, so little consonant with art and guilt, it is to be found in the testimony of this witness. There had been a misunderstanding between the wife and husband. What marriage is exempt from like difficulties? At best, we are but frail creatures, and light are the causes which sometimes move dissensions between hearts that love.

In a moment of despondency the deceased fancied that his wife loves him not, and he penned the letter, which she, in an unguarded moment, reads to the witness, and which is now produced to take away the life of one he loved. She counsels with Miss Register as to her course, and at last resorts to that line of conduct, to which an affectionate wife will always resort. She disarms his anger with a smile and a kiss. But the part of the conversation upon which stress is laid to prove her wanton and unfaithful, is her declaration to Miss Register, that she loved another better than her husband, that she married to obtain a home; and she added, "he had better not turn fool now, for that—had been visiting her ever since the marriage." If the question were, whether the epithet applied to her husband was a refined one, and whether her remark to Miss Register was a prudent one? there would be no difficulty in its determination. Certainly the disclosure by Miss Register of a confidential communication, proves the imprudence of that communication beyond question. But this is not a question of ethics, or of etiquette; it is an issue of life or death that you are trying. In ordinary matters you would be bound to place the most charitable construction upon what was said; shall you do less, in a matter involving the most momentous of consequences to the prisoner? She meant nothing more than that her husband's jealousy was unreasonably excited—had been a visitor at the house ever since her marriage. Why was her husband's jealousy now aroused? It was foolish in him now to be excited at what heretofore had failed to excite his suspicion. She had loved another before her marriage; prudential considerations had controlled her choice.

Hers was not an isolated instance. Marriages are as often dictated by prudential considerations, as by the feelings and sentiments of the heart; and, perhaps, as frequently, prove happy. These considerations, it is true, ought to have operated upon the prisoner, to have made her circumspect in her conduct, and chary of her confidence; but let us not be too exacting in our requirements. We can scarcely expect to find a young and giddy girl suddenly transformed by marriage into a grave and sedate matron.

But, gentlemen, the charge the State prefers against her, that she is a wanton, rests wholly upon suspicion without proof, and conjecture without corroboration. There is direct testimony to negative it, and negative testimony to disprove it. The letter of the husband brings no such charge against her. He complains merely that her affections are alienated. He bids her remain under the shelter of his dwelling and denies not her a place at his hearth. Think you, if she had been the wretched thing the State would have you believe, a creature for others' uses, he would have suffered her to remain? Rather would he have expelled the polluted one, and bade her seek protection in the arms of her guilty paramour. But the negative proof is still stronger. If such a guilty connection had existed, direct proof could have been furnished. The individual charged is within the jurisdiction of this Court and amenable to its process. Why has he not been called? In a case affecting life, it is not to be expected that the prosecution will give way to a sickly delicacy. He has not been called and I demand for the prisoner every fair presumption growing out of the omission. The State has made the charge, and is bound to establish it without a reasonable doubt. The prisoner is not called upon to prove her innocence.

Gentlemen, all the witnesses examined have been called by the government. We have briefly reviewed their testimony. I submit that upon it you cannot feel convinced of the guilt of the prisoner, at least beyond a reasonable doubt. It is almost impossible, however, that you can look simply upon the evidence detailed. The incidents connected with this unfor-



fortunate affair have been much discussed. Rumor, with her thousand tongues, has spread far and wide garbled statements. Facts have been distorted. Invention has racked itself to color, with fuller hues and deeper dyes, circumstances in themselves trivial and insignificant. A stranger would be astonished to find in the weeping girl before you, the unnatural monster busy fame has painted. More or less, you may have partaken of the general prejudice. And still, in the face of all this, I dare to say, you cannot be convinced of her guilt, beyond a reasonable doubt. She has produced no witnesses. In the nature of things she could have none. The State relies upon circumstances to prove her guilt. She appeals to the same circumstances for her innocence. Such hues of health could never tint a guilty cheek; the weight of such a horrible crime, were she guilty, would weigh her down. But though she has no living witness to produce, one for her speaks from the dead. Her strongest witness is this dead Alexander C. Simpson. Fortunately for her, during his brief illness, his intellect remained unclouded. He was neither comatose nor delirious. The mind in all its vigor, occupied its citadel to the last. Numbers of persons saw him during his sickness. The medical gentleman, in whom he confided, was with him upon three several occasions. Those to whom he intrusted his business affairs were with him repeatedly. One, upon whom, in his mortal agony, he called to pray with him and for him, was there. If he had had any communication to make, ample opportunity was afforded. Gentlemen, when one becomes sick, the first and most natural inquiry uppermost in his mind, is not what can relieve him? but what ails him! Simpson, says the prosecution, was suddenly stricken with illness; he grew worse in despite of remedies; his symptoms were those which follow the exhibition of a deadly poison; his wife had proved unfaithful and had dishonored him; his affection for her had become alienated; it was known to him that she had purchased this fatal arsenic; she had but a few days since predicted his death; had spoken before him of the effects of the poison, under circumstances of dark suspicion; procured him to eat of syllabub, and drink of coffee;

may, had given him the former at dinner, and latter at tea; and, yet he, the victim, had never suspected a fact, which the State tells you was so plain that he who runs may read. He, of all persons, in the view the State presents the case, should have been the first to have suspected foul play; it was upon him all these things were practiced, which aroused the quick suspicion of others; and yet the idea had never crossed his mind, or, if it had, he had not given it utterance.

Gentlemen, this whole case rests upon circumstantial testimony. The proposition that convictions ought not to take place upon such evidence is not tenable; it is equally false to say that it is more to be relied upon than direct proof. In some respects it is much less strong. Facts and circumstances come to you from the mouths of witnesses; the opportunity for wilful perjury is as great, and the chances of deception, mistake and misapprehension greater. How many cases are to be found in the books, where innocence has suffered the penalty of guilt, from the force of circumstances apparently irresistible. The well-known case cited by Lord Coke of the uncle executed for the supposed murder of his niece, furnishes an illustration. She had abandoned his house, and upon search, could not be found. She had been overheard to say, upon an occasion, when he was correcting her, "Oh, good uncle, do not kill me!" She was entitled, at a certain age, to receive from him her property. This fact furnished a motive. Unable to produce her at the assizes as directed, he dressed up another girl to represent her. The detection of the falsehood afforded conclusive circumstantial proof of his guilt, and his life paid the forfeit. Some time afterwards she appeared to claim the property. Jonathan Bradford's case is equally striking. He was an innkeeper. A guest was found in a chamber weltering in blood at midnight. Bradford was found standing over him, with a bloody knife in one hand and a dark lantern in the other; and upon apprehension, he exhibited great terror. The guest had been robbed, here was a motive. The unfortunate Bradford was convicted and executed; but it afterwards appeared that the crime had

been committed by another, who escaped from the room as Bradford entered.

These cases are perpetual monuments and beacons, to warn jurors of the great danger and hazard they encounter in convictions upon circumstantial testimony. Better, by far, that ninety-nine guilty persons should escape than that one innocent should suffer.

"And the greater the crime," says a distinguished writer upon evidence, "the greater the caution to be used. Anxiety to detect crime often leads witnesses to draw rash inferences; there is a pride and vanity of the human heart felt, in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment."

Mr. Solicitor has pointed to you the beautiful emblem of justice which adorns this judgment seat. In one hand she holds the avenging sword, and with the other balances the scales. He bids you also to weigh the testimony. Not so, gentlemen; not so. Capital convictions are not to be made upon the preponderance of probabilities. "You must have," says Baron Parke, in *Stearne's case*, "such moral certainty of the prisoner's guilt as convinces your minds, as reasonable men, beyond a reasonable doubt." "If twelve men indifferently chosen, after full argument upon the evidence and instruction from the Court upon the law, and opportunity for full deliberation," says that learned and distinguished jurist, Chief Justice Ruffin in *Ephraim's case* (2 Dev. & Bat., 171), "be not agreed of the guilt of the accused, he ought to be acquitted. The whole jury, upon the fair and invincible doubts of a part of their body, must adopt an opinion favorable to the prisoner; since in a case of real doubt, the law leans to the presumption of innocence."

Upon the whole case, then, I submit, the prisoner is entitled to an acquittal. Go on to investigate the facts, even with minds prejudiced against her, and doubts will arise upon doubts at every step of your progress; doubts reasonable and insuperable.

Gentlemen, I fear I have trespassed too long upon your

kind indulgence, I feel I have said little to inform his Honor or shed light upon that path you are called upon to tread. Whatever of ability I have (little indeed it is), I owe it to the prisoner to exert in her behalf. In this her hour of imminent peril, I have endeavored, at least, to discharge my duty.

Gentlemen, the authorities of the government appointed yesterday as a day of general thanksgiving. Our people were bidden to abstain from all secular pursuits, and to repair to their respective places of worship, there to render thanks to Almighty God for all his beneficent kindness. His Honor justly deemed it an act of mercy and necessity to continue the sittings of this Court. Yesterday was no day of thanksgiving for my unhappy client; it was to her a day of trial, humiliation and sorrow. Today you can make one heart glad. God grant that you may feel authorized to unloose the prison doors and set the captive free; that today, nay, that the rest of her life may be one perpetual day of thanksgiving to Almighty God for so great an additional mercy vouchsafed unto her.

MR. DOBBIN, FOR THE STATE.

Gentlemen of the jury, I have been employed by the brothers of the late Alexander C. Simpson to co-operate with the State in the trial of the prisoner. The task is delicate and responsible and embarrassing, but shall be executed at least faithfully and fearlessly. I shall not play the part of the cruel persecutor, but I shall certainly act the earnest prosecutor to search for the truth, to bring the transgressor to punishment, to vindicate the majesty of the law. Eloquence, full of touching pathos, and thrilling, heart-stirring appeals, have caused you and more than you ever and anon, to weep in sympathy for the "poor unfortunate," "the poor woman" at the bar. I will neither strive to stir up your prejudices, nor bid you crush your generous sensibilities, nor murmur that you do not coldly chase away the starting tear. But I solemnly warn you as men—as sworn men—those tears are not to blot out the law!

If the voice of humanity admonishes you to deal tenderly

with the "poor woman," and not rashly to consign her to death, the voice of humanity also, in the name of society at large—in behalf of the life of others, and the peace and safety of all—bids you beware how you thoughtlessly in a moment of feeling, surrender your better judgments, and say to the wicked, "Go on in your iniquity, and do your deeds of dark atrocity."

You are told that she was the deceased wife and the shocking unnaturalness of the crime is made to plead for her innocence. Wife—husband—endearing terms, indeed! And the Christian heart recoils with horror from the contemplation of such dreadful depravity. But alas! while it hath been truly said, "Seek the good wife of thy God;" "She is the best gift of his providence;" it hath also been said, "An artful, false woman shall set thy pillow with thorns."

You have been told of her beauty, too, and my distinguished friend, Mr. McRae, has held up before you the picture of her girlhood days—when her life glided on sweetly amid sunshine and flowers, and gay admirers and doting parents—now darkened and beclouded, a poor prisoner in the damp vaults of the dungeon, with the light of heaven only reaching her through iron grates—with the officers of the law now inviting you to cruelly consign her to an ignominious grave and to hurry her into eternity! The picture was by him beautifully sketched, and held before you with the skill of one who knew you had hearts that could feel. Gentlemen, I complain not of the counsel, but when in his eloquence he spoke of hurrying one into eternity without warning, neither I, nor you, nor anyone of this vast concourse, could avoid the contemplation of another, and if possible, a sadder, more touching picture. A stranger came among us to seek our generous Southern hospitality. Troops of friends cheered him on. None knew him but to love him. Perhaps the sun never shone on a kindlier man. Captivated by the charms of one who seemed the lovely woman, he blended his destiny with hers. Ann K. Simpson became his bride. For a season his pathway was checkered over with sunshine and cloud;

lessly disregarding all the teachings of science and the results of the observation and experiments of the past and the present age. Now, before proceeding to compare their tests and experiments with authorities, let us first inquire whether the symptoms were such as arsenic produces. Remember the evidence is that the deceased drank a cup of coffee at the instance of the prisoner, on Wednesday evening. As soon as he drank he complained of being sick. The witness, Smith, who testifies to this, remained about twenty minutes and left, and on returning to breakfast next morning, was informed by the prisoner that Mr. Simpson had been sick all night. Dr. Mallett called in then to see him. Prisoner and deceased both told him he had been sick all night, of vomiting, nausea, burning pain at the pit of the stomach and thirst. He called again in the afternoon, and found his symptoms aggravated; distressed countenance; evacuations from the bowels, he was informed were of a dark color. No mention was made of blood to the doctor, who did not himself see the discharges. Now hear what the learned Dr. Christison says on page 237, late edition of his work on poisons. He is speaking of the effect of arsenic: "Soon after the sickness begins or about the same time, the region of the stomach feels painful, the pain being commonly of a burning kind, and much aggravated by pressure; violent fits of vomiting and retching then speedily ensue, especially when drink is taken. There is often also a sense of dryness, heat and tightness in the throat, creating an incessant desire for drink." Again, on the same page, this author says, "In no long time after the first illness diarrhoea generally makes its appearance, but not always." And in describing the pain felt, he says, "it is often likened by the sufferer to a fire burning within him."

Now, gentlemen, recur to the description of the deceased's suffering, as testified by Miss Arey and Dr. Mallett: Thirst, burning pain in the stomach, vomiting, nausea, evacuations. But it was contended by the counsel for the prisoner that there could not have been arsenic either in the syllabub or the coffee, because, say they, it would have brought on the symp-

toms sooner. Let us recur to the evidence and compare it with the authorities. The evidence is, that as soon as he drank the coffee, he declined another cup, and complained of feeling sick. Smith sat with them about twenty minutes, when the prisoner was trying Mr. Simpson's fortune with a cup, and talked of the sick bed, coffin and muddy road and told Mr. Simpson he was going to be sick. Now, how soon after Smith left the symptoms began we may not be positively certain; but Dr. Mallett and Mr. Smith both tell you that in the morning either the prisoner, or Simpson, or both, said he had been sick all night. Now, if he had been taken early in the morning or after midnight even, would they, or either of them have said he had been sick all night? Now, the State alleges that his sickness either began immediately after drinking the coffee and was occasioned by the arsenic in the coffee, or he had felt badly from the arsenic in the syllabub (which may have been but a small portion), and after drinking the coffee felt worse, and declined taking more, and that the bad symptoms began soon after Smith left, and continued growing worse, until he died the next night. But, gentlemen, hear what Dr. Christison says on page 43. He is speaking of symptoms: "The first characteristic is the suddenness of their appearance, and the rapidity of their progress towards a fatal termination. Some of them act instantaneously, and the effects of most of them are in general fully developed within an hour, or little more. But this character is by no means uniform. The most violent may be made to act, so as to bring on their peculiar symptoms slowly or even by imperceptible degrees. Thus, arsenic which usually causes violent symptoms from the very beginning, may be so administered as to occasion at first nothing more than slight nausea, or general feebleness; and afterwards, in slow succession, its more customary effects." Now, gentlemen, when you recollect that the prisoner had consulted Mrs. Rising, who may, in her secret counsels have found out, and told Mrs. Simpson how to administer the arsenic so as to make it operate slowly; when you recollect that he complained of being sick immediately after drinking the coffee at supper; when you recollect that



he suffered all that night, the peculiar symptoms described as being produced by arsenic, and compare these facts with not only the opinions of the physicians, but the particular opinion of the learned Christison, are you not satisfied that the evidence from the symptoms is strong, powerful and convincing and by no means deficient or inconsistent with authorities? So much, gentlemen, for the evidence derived from the symptoms. But the State is far from relying exclusively on this evidence. There was a post-mortem examination of the body in a day or two after the death. Let us see if the morbid appearances therein correspond with the usual appearances occasioned by arsenic. Drs. Robinson and Mallett tell you the stomach was inflamed (I think one of them used the expression "a blush of inflammation"); that the intestines were inflamed; there were several erosions or ulcers; and Dr. Robinson expressly stated that there were small white particles near and in these erosions, or ulcers. Now, these are precisely such appearances as the physicians and the books tell you arsenic would produce. And, in regard to these specks, or particles, that were found in and near these erosions, hear what Christison says, in speaking of arsenic on page 269: "Frequently it adheres to the coat of the stomach, and is there either scattered in the form of fine dust, or collected in little knots. The adhering particles are always covered by mucous; they are often surrounded by redness of the membrane, or by effused blood, and sometimes they are embedded in little ulcers." Now, gentlemen, one of the counsel read to you an extract from Christison, warning you against these particles in which he says, you must not hastily consider every white powder in the stomach arsenic; but remember that the physicians expressly told you that they picked some of these white particles from the stomach and subjected them to chemical tests (which I will more particularly comment on directly), and the result was conclusive, that they were particles of arsenic. But, gentlemen, the State did not stop the investigation here, but introduced before you the evidence derived from chemical analysis. The physicians tell you, that after the contents of the stomach

of the deceased had been evaporated, boiled with distilled water and filtered, they resorted to a series of experiments in accordance with the rules prescribed by the highest authorities and the most learned chemists, and the results produced were such as to authorize them to say, in the presence of their God and this vast assembly, that they have no doubt of the existence of arsenic in the stomach; and from the absence of any other peracute indications of disease in the heart, liver, lungs or elsewhere, that they have also no doubt that arsenic caused the death of Alexander C. Simpson. And gentlemen, these physicians and the learned Dr. Colton, have not merely given you their opinion, but have related in the most lucid, clear, convincing and scientific manner, the most minute account of their experiments.

Now, gentlemen, the books, as well as the physicians, inform you that arsenic in a state of solution may be detected by what are called liquid tests. Dr. Christison (page 27), speaking of the process by liquid reagents, says, "The most characteristic and precise are hydrosulphuric acid, ammoniacal nitrate of silver, and ammoniacal sulphate of copper. The indications of the three tests must concur; otherwise in a medico-legal case, no one can be entitled to speak with certainty to the existence of arsenic; but when they do concur the evidence is unimpeachable." Drs. Robinson and Mallett told you that a portion of the filtered solution from the stomach was subjected, first, to the ammoniacal nitrate of silver test, giving first a precipitate of light yellow or lemon color, afterwards changing to a brownish hue. Well, Christison says, on page 208, that this test produces "a lively lemon-yellow precipitate of arsenite of silver, which passes to a dark brown under exposure to light." They told you that they subjected another portion to the ammoniacal sulphate of copper test, and the result was a precipitate of an apple-green color. Dr. Christison says, on page 209, that this test "causes, in solutions of the oxide of arsenic, an apple-green or grass-green precipitate of the arsenite of copper."

They told you, that with another portion, after mixing with

it a few drops of pure hydrochloric acid, they boiled pieces of bright copper until an iron-gray coating formed. This, you will remember, they called Reinsch's test, and the result produced is precisely in accordance with the authorities, and more particularly with the account given by Taylor in his work on Medical Jurisprudence, on page 134, a work so often referred to on this trial. They told you then, gentlemen, in order to test the experiments conclusively, that they procured a genuine article of arsenic, made a solution of it, treated it in the same way with the various liquid tests and in each case a similar result was produced. They then related to you another experiment, the result of which must, unquestionably have forced conviction on the most unwilling minds. They took some of those white particles which they picked from the stomach, put them into a test tube, with a flux of dried carbonate of potassa and charcoal, over the heat of a spirit lamp, and what is known as the metallic ring was formed distinctly. You will remember, then, they stated, that that portion of the tube on which the ring was, was cut off by means of a file, and placed in a larger tube; heat was applied, and crystals sublimed. Distilled water was poured in and boiled until the crystals dissolved. To one portion the ammonia nitrate of silver test—to another ammonia sulphate of copper test—to a third, sulphureted hydrogen gas was applied; all giving the characteristic precipitates of arsenical compounds.

Then, gentlemen, Dr. Colton was examined. Drs. Mallett and Robinson are fully sustained by Dr. Colton. He, too, applied the two liquid tests which I have mentioned, and the results were the same. Water charged with sulphureted hydrogen gas caused a yellow precipitate. He then took some of the precipitate derived from the sulphate of copper test, dried it, and put it into a tube with charcoal, and subjected them to the heat of a spirit lamp; and an iron-gray ring and crystals sublimed. The same precipitates and some of the white particles were subjected in the proper way, by him to blow-pipe heat, and exhaled the garlic smell. He then took a known solution of arsenic itself, and it produced like results.

I have endeavored hastily to present before you the evidence of these scientific gentlemen. And now, gentlemen, are you surprised that they all concur in saying, they have no doubt about the arsenic in the stomach of the deceased? And gentlemen, can you doubt, after hearing this testimony, and reflecting on it? It was natural, gentlemen, that the counsel for the prisoner should strive to weaken the force of this powerful testimony. They have occasionally resorted to ridicule, to cause you to regard with laughter and contempt this display of science. They have read to you various short extracts from the books, which were calculated to cause you to hesitate and distrust; but, gentlemen, these physicians are fully acquainted with those very authorities. They have made them their study; and from the teachings of those books themselves, they tell you they have no doubt. It was said, that the ammonio nitrate of silver test was not satisfactory, because when there is a minute portion of arsenic, the characteristic precipitate cannot always be obtained. But, remember, here it was obtained in great abundance. Remarks were also made of a somewhat similar character, about the sulphate of copper test; but, gentlemen, remember that all the tests produced the usual results which a solution of arsenic produced when subjected to the same; and Christison expressly says, "When they do concur, the evidence is unimpeachable." Then there was the garlic odor from this solution, peculiar to arsenic. And again, the contents of his stomach were not offensive from putrefaction; and the books and physicians both tell you of the strong antiseptic virtues of arsenic, which undoubtedly had this effect in this case.

I apprehend, gentlemen, that neither you nor his Honor, nor any intelligent listener here, can entertain a rational doubt that the deceased came to his death by means of arsenic in the stomach, unless you stopped your ears, and suspended the operations of your reasoning faculties. I take it that you are satisfied that the first proposition is established.

But, gentlemen, the most important, the most solemn, the most painful inquiry yet remains. Who administered the

fatal poison? The State alleges that the prisoner did the deed—that the wife murdered her husband. Is this true? You shudder at the thought! So awful the crime, so unnatural, so unreasonable! Let us cautiously examine the testimony in detail, and as a whole. But before alluding to the testimony, allow me to read from some of the best authorities known to the law, a few brief extracts to enlighten you as to the character of circumstantial evidence, the force and weight it is entitled to, lest you may do yourselves and the law and the State injustice by withholding from this species of evidence that confidence which you are bound to give it, lest you may be misled by the ignorant notion that positive evidence alone is sufficient. Perhaps gentlemen, I do you great injustice to suppose for a moment that in this enlightened age, there is a man in that jury box capable of entertaining wrong prejudices against this species of evidence. But the language of the law is so clear and convincing and will shed so much light on your path, that, I take it, you will prefer to hear it.

I quote first from Starkie on Evidence, a treatise so high in its character that no commendation of mine can add to it as an authority:

“On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the difficulty of fabricating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than direct and positive evidence, wherever the aggregate of doubt arising, first, upon the question—whether the facts upon which the inference is founded are sufficiently established, and secondly, upon the question whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt; whether, in the case of direct and positive evidence, the witnesses are entirely faithworthy.”

These remarks are made by the learned author in his comparison of the value of direct and of circumstantial evidence.

I quote next from Best on Presumptions, part 3d, section 188: “A number of circumstances, each individually very slight, may so tally and confirm each other as to leave no room for doubt of the fact they tend to establish. . . . Not to

speak, says Mr. Bentham, of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together you will find them pressing on the delinquent with the weight of a millstone."

And first, let us inquire, did she have a motive to prompt her to do the deed? Did she desire his death? Mark the answer of the State sustained by the testimony. Yes, she had the motive—the all-absorbing, the most powerful motive—the motive that the history of the world tells us, and our knowledge of the human passions tell us, hath alas—alas! too often driven on frail mortals to deeds of blackest atrocity. She loved another! By her actions and out of her own mouth she proclaimed that she loved another—aye, and better than she loved poor Simpson—her own husband! Harken to the plain testimony of Miss Register, whose modest and cautious and gentle demeanor on the witness stand, showed that she gave no coloring to the facts designedly unfavorable to the prisoner, and whose character was unassailed and is unassailable. "I have often heard Mrs. Simpson, not long before Mr. Simpson's death, say that she loved another better than him; that she had loved him before she married Mr. Simpson, and was engaged to be married to him, but her friends broke it off; that she had not loved Mr. Simpson, but married him to get a home; that one morning, about a month before Mr. Simpson's death, Mrs. Simpson said to me, 'Here is a note I found on the table from Mr. Simpson,' and she read the note, and among other things the note said, 'Ann, I once thought you loved me, but now I have reason to think you love another better than me!'" Gentlemen, pause, dwell a moment on this startling first act in this dreadful tragedy. Know ye anything of the human heart? Know ye anything of the human passions, love, hatred? What will not love prompt one to do for the one who is loved? What hath not malice maddened one to do to one who is despised?

She loved another; she never loved Simpson; she married him for a home. And now mark the point. The charm of concealment is broken; poor Simpson has found it out, and

says, "Ann, I once thought you loved me, but now——" Gentlemen, to love another might tempt her to do wrong; to hate Simpson might urge her on still more; but to know that he knew it would of all things be the surest to fill her with rage and madness, and drive her to desperation and crime. Are you not satisfied that she had the motive? Did she have the opportunity? Gentlemen, she was his wife in whom he trusted; she presided at his table; she prepared his syllabub and she sweetened his coffee! Did she have the arsenic? Gentlemen, young Mr. Smith discloses the terrible fact that on the 3d of November he sold one ounce of arsenic to Mrs. Simpson—just five days before his death!

Then here is the motive, the opportunity, and the fatal poison in her hands, just five days before his death—and that poison the same article which the physicians say they have no doubt caused the death of Alexander C. Simpson. But let us proceed—let us see if there be not link after link, until a chain is formed, that necessarily, irresistibly, binds down the prisoner at the bar. Mark her conduct before his death—at his death—after his death.

Do you remember the testimony of Samuel G. Smith, a man of truth, recognized by all as a trustworthy, respectable man? Mr. Simpson died on Thursday night. On Wednesday at dinner, Mrs. Simpson placed a glass of syllabub at her plate and another at Mr. Simpson's, and excused herself to Messrs. Whitfield and Smith for not having some for them, as they were Sons of Temperance. He ate his syllabub, and on asking for more she gave him her glass. At tea that evening, although she had been in the habit of giving Mr. Smith the first cup of coffee on his receiving from her the first cup and beginning to stir it, his attention is suddenly arrested by her exclaiming in a positive and animated tone, "Mr. Smith, I said, that was Mr. Simpson's cup." He passed the cup—Simpson drank the coffee and on being asked by her to take another cup he declined, remarking that he felt sick! That night he spent in agony! Vomiting, nausea, pain! At dinner on the day of his death, when he, in the next room, was



in all the distress and suffering and writhing pain, that a poisoned victim experiences, she says to Mr. Smith, "Mr. Smith, what effect does arsenic have on anything?" Ah! gentlemen, why this inquiry? What has set her to thinking about the effect arsenic has on anything? She said she threw what she bought under the sand. But did she? And why did she say she had thrown it under the sand?—of course there it could hurt nobody? Gentlemen, was she thinking that remarkable symptoms might create talk and suspicion? Was she thinking, that as young Smith could prove, if the crisis arose, that he sold her arsenic just before Mr. Simpson's peculiar suffering, that she had better say that she had thrown it away? And did the hapless, unfortunate girl in her weakness, deceive herself with the idea that she could thus deceive the world? Poor, deluded fallen creature! We cannot but pity her, even in her depravity. Ah! gentlemen, "murder will out." "Of the abundance of the heart the mouth speaketh." The perpetrator of crime rarely accomplishes his deed without leaving some vestige to disclose his guilt. That little circumstance about the syllabub—that little circumstance about the coffee—his being sick just after he drank the coffee, seem trifling, unconnected with other facts; but when they are all collected in one mass, do they not press with the weight of a millstone on the prisoner at the bar?

But look a little farther into the poor woman's conduct. Just after the fatal cup had passed from the lips of the doomed victim, she takes another cup, not to drink but to read in it the fate of her husband. She turned the cup, saw "a sick bed and a coffin and a dark and muddy road," and told Mr. Simpson he would be sick and spoke of fortune-telling, and of death! Gentlemen, did her thoughts and her wishes, and her designs, lend a coloring to the cup? The jaundiced eye lends a color to the object on which it gazes. Why, on that night, at that time, just when the sickening cup had passed from the poor man's lips, why were her dreams and her thoughts of sick beds and coffins and dark and muddy roads—of fortune-telling, of sickness, of death? And on that

night Simpson's terrible agonies begin, and on the next night he dies. Was she endowed of a sudden, with capacity to foresee and foretell? Or did she know that the fatal dose had been given to poor Simpson, and even in her depravity, could she hardly suppress the feeling darkly and mysteriously to hint to the poor man and set his thoughts on death and the gloomy fate that was soon to befall him?

But again, let us look a little more into her conduct before the death. Were you not shocked at the testimony of Mrs. Butler?

She testified that she repeatedly saw Mrs. Simpson at Mrs. Rising's, the fortune-teller; saw them turning cups; heard the fortune-teller pity Mrs. Simpson one day when she complained about Mr. Simpson and heard the fortune-teller then say to her these words that tear away the thin veil of mystery and secrecy sought to be thrown over this tragedy, "If you will do as I tell you, he will not be a living man for a week." Ah! gentlemen, what does this mean? What had the disgusting creature, the fortune-teller, told her to do? Had she told her to give the poor man arsenic? "If you will do as I tell you, he will not be a living man for a week!" Something is to be done, and then Simpson is to die, and that something is to be done by the prisoner. Yes, gentlemen, and something is done; arsenic is given to Simpson, and he dies. And mark ye, on the very night of his awful death, when his vital spirit had just taken its flight, and the clay tenement left behind was scarcely cold—when friends were piously dressing the body for the tomb, what was then the conduct of the prisoner? In another room of the same building—without a tear in her eye—the poor, giddy, hapless prisoner, says to Miss Arey: "What the fortune-teller, Mrs. Rising, told me has come true. She told me Mr. Simpson would live but a week, and that I would marry again, and marry the one that loved me, and courted me before I married Mr. Simpson!" Pause and think over this! Was this the grief of one whom God had made a widow, or the uncontrollable satisfaction, joy of one who had done her work? But, lest I may forget it, allow me to re-

mark on the fact that the counsel for the prisoner seek to discredit Mrs. Butler, by making her admit that she had children before she was married. Gentlemen, give that fact the weight it is entitled to. But remember an unchaste woman, or a bad man, may sometimes swear to the truth, and if they are corroborated and sustained by a witness of pure and unblemished character, then they are entitled to credit. Now, mark how Miss Arey's testimony sustains Mrs. Butler. Mrs. Butler says she heard Mrs. Rising tell Mrs. Simpson, the prisoner, "If you will do as I tell you, Mr. Simpson will not be a living man for a week." Miss Arey says that a few minutes after Mr. Simpson died, Mrs. Simpson went upstairs with her, and told her that "Mrs. Rising had told her that Mr. Simpson would not live but a week!" And that the prisoner was in the habit of consulting Mrs. Rising is also proven by Miss Register. Now, gentlemen, will you reject the testimony of Mrs. Butler (blemished though her character may be) when she is thus sustained? And if it be true, who can say that any more doubt hangs around this sad affair? It may be painful, shocking to believe, but how can we doubt?

But mark her conduct again. When Simpson was in his inconceivable agony, Dr. Mallett says she placed her hand on his brow; he turned his head from her and her cold remark, "Ah, you are a touch-me-not today." Gentlemen, did the poor man, when he turned his head from her, then have suspicions that there had been foul play? Did she show the tenderness of a true woman when she coldly said, "Ah, you are a touch-me-not today"? Shall I repeat to you the testimony of Miss Arey? The recital of her tragic story need not be made. It was clear, convincing, heart-rending. You remember it—you never can forget it. And now, gentlemen, pause a moment and look at these facts, ponder them well. And I ask you, as reasonable men, can you entertain a reasonable doubt on this grave and terrible question? And when you inquire now, Who caused the death of Alexander C. Simpson? does not the remarkable combination of melancholy facts point you to the prisoner at the bar? Look again—look again at the apparently trifling circumstances, and put them all to-

gether, and do they not form a terrible, horrible, shocking mass, that, in spite of mercy, crushes the unfortunate prisoner?

What caused the death of Simpson? Scientific and learned physicians and chemists answer, Arsenic. Who had purchased arsenic but a few days before his death? The testimony says, The prisoner at the bar. Who was tired of poor Simpson, and loved another, and consulted fortune-tellers about his death? The testimony says, The prisoner at the bar. Whom did the fortune-teller advise to do something, and then Simpson would not live a week? The testimony says, The prisoner at the bar. Who, with positiveness almost amounting to a command, caused another to hand to Mr. Simpson the coffee which he was about to take himself? The prisoner at the bar. Who prepared that particular cup of coffee, after drinking which Simpson complained immediately of feeling sick? The prisoner at the bar. Who was inquiring about the "effect of arsenic on anything," when Simpson was in agony in the next room, the very day of his death? The prisoner at the bar. Who, without a tear in her eye, in a few minutes after his death, talked coldly of his death and of marrying the one she loved? Miss Arey says, The prisoner at the bar.

And now, gentlemen, you have to pronounce whether the prisoner is guilty or not guilty. I have endeavored to do my duty. The brothers of the dead man employed me to assist the State in thoroughly searching out the truth of this case. Neither they nor I desire you to make a victim of the prisoner. If you can, in spite of all this array of evidence, still say you have "a reasonable doubt," humanity, and the law, too, admonishes you to acquit her. God forbid that I should ask you to turn a deaf ear to the voice of humanity, or rashly to trample on a benign principle of the law. But, gentlemen, if the testimony rivets conviction on your mind, that she did that deed of monstrous depravity and cruelty—that she administered the fatal dose that hurried poor Simpson to an untimely grave, then I charge you as honest men, as good citizens, as sworn jurors, to do your duty, and, painful as it may be, to pronounce her guilty.

## MR. STRANGE, FOR THE PRISONER.

*Mr. Strange.* Gentlemen of the Jury: I rise in defense of a prisoner against whom a cloud of prejudices has been arrayed, and against whom, guiltless (as before God I believe her to be) of the charge preferred against her, the cry of the rabble is raised, and thousands are athirst for her blood. The very nature of the charge is shocking to the feelings of all, and cuts her off from sympathy; and there may be danger of her condemnation, not because she is guilty, but merely because she is charged with a crime so shocking as to unsettle the judgment of her triers. All have deserted her but her faithful, devoted mother, who clings to her through good and through evil report, has been with her through her imprisonment, and now pillows her head upon her bosom as she lies almost lifeless in the prisoner's box. Her own sex, so kind and benevolent on most occasions, on a charge such as this fly even from a suspected person with a horror either feigned or real, and are the first and the loudest in swelling the cry against her. From them comes to her no look of encouragement, for her no tear of sympathy is on their cheeks in this, her hour of bitter suffering.

"No gayer insects fluttering by  
Ne'er droop the wing o'er those that die,  
And lovelier things have mercy shown  
To every failing but their own,  
And every woe a tear may claim,  
Except an erring sister's shame."

It has been remarked that this is a most extraordinary case. It is indeed extraordinary. Hitherto we have been wont to see ruffians, and negroes, and the outcasts of society brought to your bar. But now something which has assumed the name of Justice, as if disdaining an ordinary victim, has gone forth into one of the most respectable families in our county and dragged from thence a being almost a child, fair and beautiful, in the very bloom of womanhood,—to strike us with amazement, and to furnish food for one of the strange appe-

tites of man. Noble as is the nature that we claim, it hath, after all, much of the brute about it; and when this brute portion of our nature is stirred up, it delights in cruelty and feeds itself with horrors. The death of one of the species is one of the occasions on which the noble and rational part of our nature is dethroned by brutal fury, and especially when that death is accompanied by circumstances of mystery or peculiar agony; and, like a herd of cattle who have smelt the blood of some slaughtered comrade, men are found galloping over the plain, filling the air with horrid bellowings, and ready to destroy anything that comes in their way. Such an occasion is the present. A man has died in great agony, and under circumstances of mystery, and the brutal nature of man has been aroused, and in its fury, ungoverned by reason, it pushes at the prisoner with a purpose to destroy her. Is there no chivalry left amongst us that will enter the arena against these infuriated beasts, and defend this young creature from destruction? So contagious is this madness, that it has seized even upon those whom we should least suspect, and somehow or other this prosecution is not left to the able gentleman to whose duty it appertains, but another talented member of the profession is also engaged in its enforcement. He tells us that he appears for the friends of the deceased, Alexander C. Simpson, as the avenger of their wrongs. Pray, what interest ought any real friend of Alexander C. Simpson to have in this prosecution? Will the execution of his widow bring him up from the dead and give him back to the embraces of these so-called friends? Is it not enough that their friend has died mysteriously—that he hath fallen prematurely into the grave? Will it lessen their sorrows or give to them a family trophy, that his widow shall die by the hand of the common hangman, and the fate of a felon's await her remains? Good heavens, if such a satisfaction be desirable to them, are you inclined to give it to them? We do not complain that this trial is brought on; on the contrary, we think it right that this investigation should be made. There are circumstances of mystery about the death of the deceased that call for examination, a full and free examination. The

prisoner herself has courted, and still courts, this examination. It is due to her, as well as to the public, that it should be made. But we do think it has been pressed with little kindness and with too much rigor. We attach no blame to the honorable gentlemen who appear for the State; but, under the influence of professional zeal, and partaking of the general prejudices against the prisoner, they have, in our humble belief, gone much too earnestly into this prosecution, and have thus deprived the prisoner of many advantages to which, in the opinion of her counsel, she was justly entitled, and have pressed the suspicious circumstances rather too hardly against her. I doubt not the sincerity of my friend who last addressed you, in saying that he would play the prosecutor and not the persecutor. But (and in no unkindness to him do I say it, and if I spoke unkindly of either of the honorable gentlemen, I should greatly wrong both myself and them), my friend, under the impulse of the time and the occasion, has not only prosecuted, but unintentionally, I am sure, persecuted the prisoner.

He told you that my associate counsel, who opened this case, had drawn a beautiful picture of a young female, whom he had once known, on whose pathway was shining the light of hope, and along which the flowers of pleasure and of innocence were springing; and had said that in a few brief years he had returned and had found her the tenant of a prison, threatened with death, and that, even should she escape death, every bud of promise for the future was withered and blighted. And, lest your hearts might be softened by this picture, towards the prisoner, the counsel carried you to the grave of Alexander C. Simpson; and, that he might steel your hearts against her, he reminded you that Simpson came a stranger to our community, and that there he wooed and won, in the bloom of her beauty, the prisoner at the bar; and he insinuated that she married him for a home, under the pretense of love, only to destroy his peace, and to take away his life. And, lest the appeals in behalf of the poor young creature (not to be carried away hastily by you to her long ac-



count) might have some effect, you were told that somebody (and it was no doubt supposed you would infer the prisoner at the bar) had not allowed Alexander C. Simpson much warning when he was sent to the bar of Heaven. You were warned, too, not to let your tears of compassion for the prisoner blot out the wholesome enactments of the statute-book. The other gentleman, for the State, asked you, that if the testimony offered by the State on this occasion is not sufficient to convict the prisoner, how can an assassin be punished? Your fears are at the same time appealed to, and, in substance, it is intimated that if you suffer the prisoner at the bar to escape, the wife of each one of you will learn that a husband may be poisoned with impunity, and your own lives will be in danger. Gentlemen, are you such poltroons as to hang a woman, lest your wives may poison you? Is this fair argument? Ought not the conviction of the prisoner to depend upon the proof of her guilt, and not upon the fears of her judges, or any notions of expediency for striking terror into the married women of the land? The same gentleman denies the position taken by my associate counsel who first addressed you, that the tests of poison must themselves be purified before any reliance can be had upon the results they show. But permit me to say that the authorities support my associate counsel; and in addition to those already cited by him, let me refer you to the *Medico-Chirurgical Journal*, page 472. But that same gentleman says that the authority of books is not to be relied on against the opinion of the physicians—that the counsel for the defendant read only such parts as suited their purpose, and you do not hear all. Gentlemen, if anything important was kept back, the counsel for the State could read it, and would undoubtedly do so. In this they have the advantage of the prisoner's counsel. Far different is it with us, in the matter of testimony kept back by the State, as we insist has been done on this occasion, without intending to impute any improper design. We speak only of the fact. It is certainly true that we called their attention to the propriety of examining all the witnesses who knew anything of the facts, and especially those indorsed upon

the bill of indictment, that you might see, as it were, with the curtain raised, or fully drawn aside, the whole transaction, and not be misled by a partial and imperfect view, derived from the testimony of only a part of the witnesses. Why were not all the physicians and chemists engaged in the post-mortem examination of the body, and the chemical analysis of its contents, introduced? Let me conjecture. Was it not, so far as the physicians were concerned, lest, in that uncertainty which appertains to the medical science, there might be a clashing in the testimony of the professional witnesses, and an opportunity thus be afforded to you of seeing how little reliance could be placed upon their opinions? Why was not Mr. Whitfield introduced, admitted to be present at the conversation deposed to by Mr. Smith, on which much stress is laid against the prisoner? Was it not that it was known that he must contradict Smith in some important particulars? I am instructed to say that had he been introduced, he must have contradicted Smith, and the prisoner's counsel would have had room to say that the testimony of Smith and Whitfield could not stand together. Smith was fully impeached in the cross-examination, and needed confirmation; and it would have been well to confirm him, if that was practicable, by Whitfield, or any one else. But, no, this plank in the shipwreck, which their discrepancy would have furnished, must be withheld from the prisoner. Why was Dr. Hinsdale kept back, who made the most perfect examination of the contents of the stomach of the deceased, and could, moreover have proven, whether it was really arsenic that was sold from his shop to the prisoner, immediately before her husband's death? Why, this would have afforded the prisoner an opportunity of proving, by Mr. Hinsdale, that the deceased himself purchased of the witness at various times, chrome-yellow, which, according to the testimony of Dr. Colton, is much like French yellow, containing orpiment, which contains arsenic, and which French-yellow was once, in Dr. Colton's own experience, taken by a young man, for sulphur, by mistake, resulting in the young man's immediate death. We should also have been able to prove by Mr. Hinsdale, on cross-exam-

ination, that the deceased had often purchased of him calomel and other drugs, which, by mistaken use, might have acted as poisons. But rather than allow us this opportunity, they have left to the uncertain testimony of James M. Smith (a mere boy, and therefore, unskilled), the fact that what the prisoner bought at Mr. Hinsdale's shop was really arsenic. And so far as that is material, how do you know that what she purchased may not have been some innocent material, having nothing in common with arsenic, but that of being a heavy white powder? But if it should be asked why we did not introduce these witnesses ourselves, we answer, that the effect of a witness' testimony depends much upon the side that introduces him; and while such witnesses, if introduced by the State, might present the case in its true complexion if introduced by the prisoner, they might operate sadly against her. They were not her witnesses, and she did not desire to trust them, knowing that they had already congregated with the witnesses for the State, and imbibed all the prejudices peculiar to that position. But chiefly, we believe, the State did not introduce these witnesses because, by so doing it would deprive itself of the right of reply, and by keeping them back it hoped to force us to do so, that we might lose it. This right of reply is deemed an advantage (whether justly or not) and we did not desire to part with it. We did not feel at liberty to deprive the prisoner of this slight advantage, or to give our assent to what seems to be assumed, that the prisoner is bound to prove her innocence, and not that the State is bound to prove her guilt.

But the gentleman, who last addressed you, has agreed, that my associate counsel who first addressed you, acted very inconsistently, in proving by the doctors the authority of certain books and then by these very books attempting to prove the opinions of these doctors erroneous. Why! where is the inconsistency? Both that gentleman and I can better appreciate the argument, by applying it to our own profession. Every student of law knows, for instance that Blackstone is a book of high authority; and would there be anything won-

derful in proving to a young man, by that very book, that some crude notion of his on a matter of law was erroneous? Is it to be supposed that everyone who admits the authority of Blackstone, knows all that is in it? And why should a physician who is able to tell what books are of authority in his profession, have any more right to claim infallibility in his knowledge of their contents? And it is treated as a great error that we should attempt to prove from these books, that there was no arsenic in the stomach of Alexander C. Simpson, while the doctors express the opinion that there was. I have only to say that no answer has been given, and I confidently believe that no answer can be given, to the argument of my associate counsel, furnished from the books, against the correctness of the opinion expressed by the physicians of the presence of arsenic. One thing is certain, that the two physicians examined, differed in at least one very important matter. Dr. Mallett said the white particles were found sparsely through the stomach, not more in or near the eroded spots than elsewhere; while Dr. Robinson declared that they were almost exclusively in or near the eroded spots. Now, which of these gentlemen is right? They cannot both be so. Neither, I am sure, is wilfully wrong. One or the other, is therefore mistaken, and their great liability to be mistaken is all for which we ever contended. Mistake is all we have imputed to that most excellent man, the Rev. Simeon Colton, although your prejudices may have been excited against the prisoner, by charging her counsel with an attack on the good sense or integrity of that gentleman. We think physicians and chemists were all mistaken, or at least greatly liable to mistake, for even the able and ingenious counsel himself is found using this expression, "That some one may have slipped in the arsenic." Some one may, and the evidence on which this prisoner's life is asked, is a maybe that she, or some one else slipped in the arsenic. We cannot help thinking there was a little too much stage effect given to the recital of the testimony of Miss Register, considering the very heavy stake dependent upon its proper conception. Nor was Miss Register's testimony given in full in the argument—that most important

part of it, the reconciliation of the parties was entirely left out. And in speaking of the affair of the coffee at supper, the counsel represents Mrs. Simpson as greatly agitated, and most unaccountably raising her voice to a loud and sharp key while the witness himself says not a word about agitation, and accounts for her raising her voice by the fact that she had spoken before, and he being attentive to the conversation of some other persons, had not heard her as she had a right to have expected.

But the prisoner's flight is pressed against her by counsel, and I think a little too much credit for fairness is taken by the State, because by the same witness the State itself proved her voluntary return. Why take any credit for this when we had only to ask the question of the same witness to have proved it ourselves? This we certainly should have done. But what of her flight? The new-made widow is sitting in her desolate chamber. One enters and tells her that poison has been found in the body of her deceased husband, and that she is suspected of having put it there, and, in fact, that the Grand Jury has found a bill against her. That, from the peculiar opportunities, which she, as a wife, had for its administration, the presumption will take place that she was the perpetrator, and unreasonable as it may seem, she would be required to prove her innocence, not the State to prove her guilt. All this, perhaps, she would have met. But she is farther told that this is Thursday, and that it is Thanksgiving Day, and today no business will be done in court, and it is now even the evening of that day. Tomorrow is Friday and it is not likely that a trial so important as yours will be taken up during this term. Whether innocent or guilty, then, you will have, for the next six months, to consort with knaves and felons and the basest of mankind. You, whose infancy was spent beneath a father's roof in the pastimes of innocence, under the smiles of maternal love, and whose later years have been passed within the protecting arms of a husband, must now go alone and friendless, into the felon's dungeon, shut out from the light of day, and from the fresh air

of heaven, for at least half a year. "With whom," well might she exclaim, "shall I take counsel? Alas! he who was my friend and safe counsellor, now lies in the dust. He who, could he now speak, from the grave, would be the faithful and true witness in my behalf, the only one who could testify certainly of the facts, is no more, and those who profess to be his friends, are now persecuting me as his murderess. Merciful God! What shall I do?" Is it any wonder that she fled? And is this flight to be taken as a sign of guilt? Listen to the voice of experience as it is written in *Best on Presumptions*, pages 188-190. But if her flight be any evidence against her, what is her voluntary return? Having fled, to make that flight effectual she must go where the wing of the American eagle had never spread, and beyond the reach of the beak and talons of that mighty bird. This she did, and in a foreign land might have remained beyond the reach of the vengeance of any law of ours, for as long a time as it might have pleased Almighty God to prolong her life. But there too the clouds of suspicion and prejudice hung about her with a continual gloom. Life was a burden spent under the leprosy of disgrace and infamy, and to rescue the name of the family to which she belonged from the cruel blight that had fallen upon it, she once more encountered the seas and traversed the desert, to confront her accusers—to look death in the face with the fearless eye of innocence. And even in this point, here in the argument, her motives have been assailed, and that absence from her paramour had become intolerable is covertly hinted at as the cause of her return. Yet, is there any proof to support such an insinuation? And is it altogether fair to make it without proof? Is it to be supposed that one having the levity of character ascribed by the State to the prisoner at the bar, could love anyone so intensely and so truly as to find no pleasure out of his presence and to encounter danger in every form, and trouble and labor without limit, to enjoy it? Can you believe that anything short of the deepest sense of her own innocence, and the firmest trust in the justice of heaven, and her country, could have induced her, of her own accord, to meet this dread ordeal? Result as

it may, with so many circumstances of suspicion about her, the stoutest heart might well have quailed at the experiment. But yet she comes of her own free will, and for her trial hath put herself, upon God, and her country, which country you are. Is not this more than an answer to her flight? Does it not prove beyond all question, that her own conscience, at least, is unstained with a sense of guilt? We read that in ancient times, a citizen was once traversing the street of a populous town, when suddenly a snow-white dove flew into his bosom, and quietly nestled near the throbbing of his heart. Surprised at the incident, he cast his eyes upwards, and beheld a ravenous hawk hovering above him. He did not cast out from his bosom the timid guest but cherished the poor bird, and saved it from the talons of its relentless foe. Gentlemen, the prisoner has, as the timid bird, come to your bosoms escaping from those who are seeking her life, who are seeking the ruin of her fame, dearer than life. Will you, let me ask you, will you cast her forth a prey to her enemies, or, like the kind citizen, cherish and protect her? But the State says, this is a court of justice, not a court of mercy, and you must judge the prisoner according to the rules of rigid justice. Gentlemen, can this be so? Shall men, who expect mercy to be mingled with the justice they are to receive from their heavenly judge, mingle no mercy with their judgment of each other? We ask you not for that mercy which shall acquit the prisoner although she may be guilty, but we ask you, in inquiring of her guilt, to look upon her conduct by the light of charity—where her actions admit of a favorable and unfavorable construction, let mercy guide you to a kind result; set down naught in malice, but judge her, as you would fain be judged, by others in your hour of trial.

Having endeavored to remove these circumstances of prejudice against the prisoner and to answer the arguments on the other side growing out of them, we proceed now to an inquiry into the material facts. The State must establish three things, before she can convict the prisoner, to-wit:

Firstly, the death of the deceased.



Secondly, that he came to it by poison.

Thirdly, that the prisoner administered that poison with an intent to destroy him, or to do him great bodily harm.

As to the death of Simpson, there can be no doubt. "After life's fitful fever, he sleeps well." But is it so wonderful that men should die—when we are told that it is even probable that every step we tread, our feet are on the ashes of some deceased member of our race—when we know, that for six thousand years death has been plying his unremitting toil? Nor is it wonderful that men should die suddenly, or even die of poison, and that without any intentional administration by the hand of an assassin. You have heard from the physicians examined on this occasion, that about the time of Simpson's death many of Mr. Massey's family were ill with every symptom of poisoning, and it was never supposed that theirs was a case of intentional poisoning. My associate counsel, who last addressed you, has given you a chapter from his own youthful history, where several members of his family were apparently poisoned in eating cheese, though no one was suspected of having given it. I remember a case of a little boy who died in this place a long time ago, on St. John's Day, from eating a syllabub, evidently poisoned; but no one was supposed to have done it by design. And I now hold, in my hand a newspaper just from Washington City (certainly not issued for the benefit of the prisoner), which contains an account of the death of a young girl from eating a cake accidentally poisoned. And may not another such case have occurred in a similar way? But did the deceased die of poison? The State insists that he did. First, from the symptoms. But "although these were once much relied on, they are now regarded as furnishing only a high probability." (Dean's Medical Jurisprudence, 305.) They ought hardly to amount to that, for it is admitted by the same author, and the authorities he quotes, that natural diseases are found with symptoms so much like those produced by poison, that it is scarcely possible to distinguish them. But so far as symptoms may guide us, there is one symptom (to-wit, acridity in the throat),

which no witness speaks of the deceased having ever felt. In speaking of the distinctive marks between the effects of arsenic and Asiatic cholera, Dean, at page 323, says, "The sense of acridity in the throat in the case of cholera, succeeds the vomiting, while in poisoning that same sense precedes it." If acridity, then, precedes the vomiting, where there is no acridity, there can be no poisoning. And this is consonant with reason; for the throat is necessarily passed by the poison in being swallowed; and there seems to be no good cause for its not eroding the throat in its passage, as well as the stomach and the intestines after its descent. In cholera the offensive matter is formed in the stomach, and of course only affects the throat in its ascent while the poison coming into the stomach from without, must needs pass the throat as it goes down. How can this negative proof in favor of the prisoner be avoided by the State? Does it not clearly establish her innocence? At least, so far as symptoms are concerned, is not the proof unsatisfactory?

Secondly, from the appearances of the body on post-mortem examination. "These, also, were formerly much relied on," says the same author, "but with little reason." (Page 309.) And here let me ask what propriety there is in determining the guilt or innocence of a person—and especially in a matter affecting life—by the opinions of experts of a profession, ever-changing in its principles and practice? As unstable as the sands on our sea-coast, where today a seventy-four may float, tomorrow an impassible sand-shoal is formed; and where the sands are now tossed about by the winds, in a few days a ship-of-war may ride in safety.

Thirdly, By evidence from chemical analysis. On this subject, gentlemen of the jury, you should be exceedingly cautious. Remember that you are venturing into a dark country entirely unknown to yourselves, with a dim light and a blind guide, and that one false step may produce irreparable mischief. It is no excuse for rashness to say, that it is a subject on which it is difficult for the State to make clear proof, and to require it would be to give the prisoner a free charter. If

the State cannot show that poison really exists, then it fails to show that there is any poisoner to be punished. On many subjects the jury is already so well informed, and the witness himself so familiar with the matters of which he has to speak, that there is not difficulty in apprehending and communicating the truth. For instance, the sensible qualities of corn bread are familiar to us all. We judge of it, by its general appearance, its specific gravity, but after all, with most certainly by its taste and smell. And any great or even considerable variation from the ordinary standard in either of these could be at once perceived and appreciated. But in dealing with poisons, arsenic, for instance, who possesses this experience, this familiarity with the subject? Besides there is no smell in its ordinary condition, and who will be bold enough to test it by the taste? There is but one thing by which even the most skillful can surely test its presence, and that is by reproduction in the form of the octahedral crystals. In this respect it ranks among the salts, each of which is distinguished and distinguishable only by the peculiar form of its crystals. And as to odor, about which much has been said, this only appears, upon the application of heat. By the experts examined on this occasion, much importance has been given to it; but Dean says, page 342, "There are some other tests, such, for instance, as its alliaceous or garlicky odor. This is evolved by the sublimation of metallic arsenic only, and not by the oxide. The objection to this is, that it does not always detect arsenic when present, and that the same odor affords no infallible proof that it is present. Zinc powder, phosphorous, phosphoric acid and the phosphates give out a similar odor." To which may be added, that the very name alliaceous imports, that the vegetable tribe of garlic will certainly yield it. There is no reliance upon the odor. Equal uncertainty hangs over the quantity that will produce death. (Dean, 345.) And what quantity was found (if arsenic at all) in the body of the deceased has been merely guessed at. But the great test of reproduction has not been obtained either by Dr. Mallett or Dr. Colton, and it is very remarkable that with all the learned men engaged in ferreting out this substance in

the stomach of Alexander C. Simpson, the nearest approximation to it proven, was by Dr. Robinson when entirely alone. I do not mention this as impugning either the integrity or the skill of Dr. Robinson, but as furnishing proof of his great liability to mistake. That when all the physicians and chemists were present, and each could correct the hasty judgment of another, they did not succeed in obtaining the reproduction of arsenic, and when one if left alone, anxious to succeed or to believe that he had succeeded he should be able to cry out "Eureka!" is certainly a remarkable circumstance, and furnishes good ground to distrust the real success of the experiment. This mode of proof, then, is quite as unsatisfactory as those we have before considered.

Fourthly, there was another mode of proving the presence of arsenic, if it had been there—namely, experiments upon animals. These were easily made, and yet, although our town is almost infested with cats and dogs, and other useless animals, not a single experiment of the kind has been made, and for aught that has been shown in this way, there may have been nothing in what the chemists call the suspected fluid injurious to the health of any animal. Why were not such experiments made? The suspected fluid was not under the control of the prisoner, and she could make none. If she had made the attempt, it would have been said that she was tampering with the contents of the stomach of the deceased, and was endeavoring to destroy some of the evidence against her. The State had everything under her own control, and not having furnished this evidence against the prisoner, as she might have done if it had existed, the prisoner is entitled to the benefit of every inference therefrom in her favor.

But my associate counsel, who first addressed you, has dwelt so fully on the second proposition in this case to wit, the presence of arsenic in the stomach of the deceased, and has so clearly shown you that the proof upon that point is altogether defective that I need not detain you further concerning it. His powerful argument has not been answered, nay, the attempt to answer it has scarcely been made, and it is still before you in all its original and unmitigated force.

I shall, therefore, proceed to the fifth class of evidence, relied on by the State, of the deceased having died of arsenic, which is so intimately connected with the third proposition involved in the prisoner's guilt—namely, that she put it there—that it cannot well be considered otherwise than in connection with the second and third positions that the State is bound to maintain to support this indictment. In this way, I shall proceed to examine, fifthly, the moral circumstances, as they are called. (Dean, 315.)

But before I do this, I desire to call to your attention two cases of poisoning. One, in which the prisoner was acquitted, under circumstances far more suspicious than those of the present case, upon the ground that his guilt was not proven, but at most suspected. The other, where the prisoner was convicted upon circumstances of guilt entirely wanting in this case. The first case I propose to mention is that of Robert Sawle Donnal. (Wills on Circumstantial Evidence, page 221.) The prisoner was an apothecary, tried in 1817, for the murder of his mother-in-law, Mrs. Elizabeth Downing. The prisoner and the deceased were next-door neighbors and lived upon friendly terms, and there was no suggestion of malice. The only possible motive was, that the prisoner was in somewhat straightened circumstances, and in the event of his mother-in-law's death, he would become entitled to a share of her property. On the 19th of October, the deceased drank tea at the prisoner's house, and returned home much indisposed, retching and vomiting, and with a violent cramp in her legs, from which, she did not recover for several days. On Sunday, the 3d of November, after returning from church she dined at home on boiled rabbits, smothered with onions, and upon the invitation of her daughter, drank tea at the prisoner's house. The prisoner handed to the deceased cocoa, and bread and butter, and while she was drinking the second cup, she complained of sickness and went home where she was seized with retching and vomiting, attended with frequent cramps, and then a violent purging came on, and at eight o'clock the next morning she died. The nervous coat of the

stomach was found to be inflamed or stellated in several places, and the billous coat was softened by the action of some corrosive substance, etc. The contents of the stomach were placed in a jug in a room to which the prisoner had access and it appeared that he had clandestinely tampered with those contents, by throwing them into another vessel containing a quantity of water. There were other suspicious circumstances, which are not particularly mentioned. Dr. Edwards, the physician, concluded from the symptoms, the shortness of the illness, and the morbid appearance that the deceased had died from active poison; and, in order to discover the particular poison supposed to have been used, applied to the contents of the stomach, the chemical tests of the sulphate of copper in-solution, and the ammoniacal nitrate of silver, which severally yielded the characteristic appearance of arsenic. He considered these tests infallible, and accounted for the omission of the reduction test, by stating that the quantity left, after the other experiments, would have been too small. Notwithstanding this opinion of the physician, the jury thought the matter too doubtful, and acquitted the prisoner. Is not this case as strong, nay, stronger, than the present? And, especially, in two important particulars, it is much stronger. I mean the immediate occurrence of sickness, after what was given by the accused, and his subsequent suspicious conduct. The other case is that of Mary Ann Burdock, who was convicted in 1835, for the murder of Mrs. Ann C. Smith, and as the author (*Wills on Circumstantial Evidence*, page 226), remarks, presents a striking contrast with the last case. The deceased, a widow of about sixty years of age, was possessed of much property in money, and had for several years lived at various lodging-places; and finally went to live with the prisoner, who kept a lodging-house. In October, 1833, the deceased became indisposed from a cold, and on the evening of the 28th of that month, the prisoner gave her some gruel, into which she had been observed by a young woman, hired to wait on the deceased, to put some pinches of yellow powder, which, she stated, was to relieve her from the pain; and after which the prisoner twice washed

her hands. The servant remarked to the prisoner that this was an unusual way to administer powders. The prisoner told the servant not to take anything out of vessels used by the deceased, falsely representing her to be dirty in her habits, and cautioned her not to tell the deceased that she had put anything into the gruel; representing that if she knew there was anything in it, she would not take it. The prisoner carried away what was left of the gruel, and in a few minutes after partaking of it, the deceased complained; in half an hour became ill, vomiting and purging and violent pain ensued, and, in about two hours, she expired. The prisoner had employed a man about six days before to purchase arsenic in order to poison rats; a pretext which was proved to be groundless. A change took place in the prisoner's habits and mode of living immediately after the death of the deceased, and she denied that the deceased had left any property. From these and other circumstances, suspicion being excited, the corpse was disinterred and examined on the 24th of December, 1834, and found to be in a remarkable state of preservation. Orpiment was found in the stomach (that is, sulphuret of arsenic), in sufficient quantities to produce death. The clear reproduction of the article left no doubt of its existence in the deceased, and the fact of having put was directly brought home to the prisoner, to say nothing of the moral facts. She was, of course, convicted. These two cases, taken together, furnish us with a sort of chart; and by comparing their circumstances as we go along with those of the one before us, we shall be the better enabled, I think, to come to a correct conclusion.

The first moral circumstance stated by the author is, "The suspicious conduct of the prisoner before the event, such as dabbling with poisons, conversing about them, and showing a knowledge of their properties." "The medical witness," says our author (Dean, 315), "may be called upon to state the extent and accuracy of the knowledge of which the prisoner manifests by his acts and conversation." Now, the only evidence, on the part of the State, relative to the prisoner



having dabbled in or talked about poisons, is her having on one occasion bought some avowedly for the purpose of poisoning rats, and that, on another, she asked the witness Smith "what effect arsenic had on things that took it, stating that she had bought some to poison rats; but learning that it was dangerous, and fearing that it might get into the food and do mischief, she had thrown it under the sand." This is relied on as furnishing the first moral indication against the prisoner. Much has been said in this case about the value and effect of circumstantial evidence. I am not at all disposed to question either the necessity for it, or its ability to satisfy the mind. All I ask is, that the prisoner may have the same benefit of circumstances in her favor, as the State claims for those against her. And I can with confidence assert, that if the circumstances making for the prisoner are weighed against those making against her, and the balances are held in a fair and even hand, the prisoner has nothing to fear—that there will not only be room for rational doubt, but that her entire innocence will be made as clear as the noonday. Let us, then, look at this conversation with Mr. Smith about the effects of arsenic. The State says that it was held at the very time that her husband was lying in an adjoining chamber, under the agonizing effects of that fatal drug. In this we believe Mr. Smith is entirely mistaken (at least, as to the time), and has omitted the very important fact, that the conversation, when it did take place, was in the presence of the deceased. This, we believe, he stated in his examination before the coroner, and this would be the statement of Mr. Whitfield, the other State witness, acknowledged by Mr. Smith, to have been present at the conversation. But let that pass. Suppose it to have taken place just at the time and under the circumstances Mr. Smith now states; is it likely, that with the supposed consciousness of guilt upon her mind, the prisoner would have dared to approach that dangerous subject? Or, if she did, that some strange emotion would not have attracted the notice of those to whom she was speaking—some wild or sinister expression of the countenance, a quivering lip, a pallor of the face, or some other en-

sign of guilt? And yet, with all the zeal of the State's witnesses (and God knows, in that they have not been wanting), not one of them discovered anything of the kind, not even with the aid of their heated imaginations. But how does it stand with the theory of the State herself, that the prisoner was acting under the advice and guidance of that arch fiend, Mrs. Rising. Had she left her without the proper knowledge of what effects the arsenic would produce? Was it necessary for her to call into her aid the profound knowledge of Mr. Smith, who tells us, that red arsenic drives rats to the fire, and white arsenic drives them to the water? Did she seriously expect or desire any information from Mr. Smith, or was it only an accidental conversation, as they were taking their meal, merely, as is very often the case, when men have no subject of common interest to talk about to relieve the awkwardness of a protracted silence? But did she then, or at any other time, show that knowledge of poisons and their effects which our book says is wont to mark the poisoner? Was she ever known to speak of them at any other time, or in any other way to mark her acquaintance with them, or that they were to her subjects of interest and investigation? Never! Nor was anything of a poisonous nature ever traced to her possession so as to justify the accusation of dabbling in poisons.

Another circumstance relates "to the purchase or possession of poison, at or about the time of the alleged crime, and the pretense under which it was procured, and whether the pretense turns out to be true or false." (Dean, 316.) Let us examine this matter. She did purchase arsenic. But was it after the manner of one who meditated the destruction of a human being? Why should she have gone in person, and in the open day? Could she not, if the hypothesis of the State were true, have procured it through the hands of Mrs. Rising, or some of her sub-agents or through a negro, who could not testify against her? But she goes in person, and in the presence of a third person, boldly asks the clerk for the article, saying, that she wanted it to poison rats. This was her avowed purpose. Was it not the true purpose? Unwilling

as Mr. Smith was, he was obliged to acknowledge that he had heard rats complained of in the house. And the only times in which the prisoner is connected with arsenic, either by word or deed, she assigns the desire to destroy the rats as the cause of that connection. In the case of Ann Burdock, the government proved that the pretense was false; they did not, as is most unkindly attempted in this case, require of the prisoner to prove her pretense to be true. The State could easily have proven the house to be free from rats, had it been so. But had they called upon Judge Potter, Jonathan Evans, James Dodd, Mrs. Butler or Thomas I. Curtis, all of whom know, and several of whom have inhabited that house, they would have found that the rats render a residence within it almost intolerable, and that the prisoner had been advised by some two or three of them to destroy the rats with arsenic. But is it enough for you that the prisoner assigned that as her reason for purchasing the arsenic, and in common charity you are bound to believe it true, unless it be proven to be false. And here permit me to remark, that not only has the State failed to convict the prisoner of falsehood in this particular but in every other. Not one untruth has been caught upon her lips throughout this whole transaction. And if it be true that the prisoner is the black-hearted murderess, they would have you suppose, it is the only instance of which I ever heard that one guilty of a black and secret deed has, both before and after its occurrence, uttered no word of untruth to avert suspicion or conceal his guilt. But gentlemen of the jury, if the prisoner had purchased that arsenic to destroy her husband, would she not have commanded the small sum of fifteen cents, the price that it cost, and bought it for cash, with the hope that it would have attracted no particular attention, and be soon forgotten? But if guilt was in her heart her folly was even greater than her guilt, for she directs it to be charged to her husband, as purchased by her, and has it recorded in indelible characters, that on the 3d day of November, 1849, Ann K. Simpson, purchased an ounce of arsenic; that, so far as this circumstance could be used against her, it might never be forgotten. And this, you are told is the

conduct of the wary dealer in poisons. Gentlemen, if your throats are sufficiently capacious to swallow such stuff as this, it will not much matter, so far as the interest of common sense are concerned, if indeed the wife of each one of you should poison you in a fortnight.

The third moral fact arises out of the circumstances attending the administration of poison, either in food, drink, medicine, or otherwise." (Dean, 316.) When, let me ask you, was the poison in this case administered, if administered at all? The State alleges, first, that it was given in the syllabub at dinner, in the presence of Smith and others. Let us examine this. Remember, gentlemen, it is not what a jealous mind may suspect, that a sober judgment should convict. A heated imagination can shape things that are not, and jealousy or suspicion is a green-eyed monster, which doth make the meat, it feeds on. Was there any arsenic in the syllabub used on that day. Has it been examined, and its contents subjected to chemical analysis? No. Why then should anyone say that there was poison in it? For no other reason in the world than that Mr. Smith fancies there was something remarkable in no other member of that family being supplied with syllabub on that day, although he himself fully explains that fact by telling us that every one present except Mr. and Mrs. Simpson were members of a society that prohibited them from the use of wine, an ingredient in that syllabub. I believe it is an ingredient in all syllabub. Except one most remarkable glass once taken by Mr. Smith, himself, which had nothing in it stronger than lemon juice. Besides that, it is said, Mrs. Simpson, there being but two glasses prepared, kindly yielded hers up to her husband at his request. Do these circumstances even tend to satisfy any rational mind that there was poison in that syllabub? But I will not stop at that. I will show you by the facts that it is utterly impossible that there could have been arsenic in it. It is laid down in the works on Medical Jurisprudence (Dean, page 345), that arsenic, the poison charged in this case, under ordinary circumstances, usually manifests its operation be-

tween a half hour and an hour after being taken. Never longer than an hour, unless the patient goes to sleep soon after taking it. Often within the half hour, sometimes as soon as eight minutes, or within the time usually intervening between the first and second cup of tea, cocoa, coffee, or chocolate. Thus, in the case of Donnal, his mother-in-law was taken sick immediately, and very ill in half an hour after taking the gruel. Now the proof is that the syllabub was taken by Simpson from twelve to two o'clock, and as late as dusk in the evening, he was walking about the street. If he had taken poison, even as late as three o'clock, his walking about at dusk without having passed through any paroxysm of illness would be contrary to the experience of any toxicologist. For there is not only no proof that he did sleep, but there is, on the contrary, proof that he did not. Besides, it is in proof that he ate the syllabub with a spoon. Is it not more than likely that in the two glasses, which it is proved he took, he would have discovered the unpleasant taste of the arsenic, or at least that he would not have been so much charmed with the taste of the first glass as to have desired the second? At any rate, according to all experience, the effects of the first glass would have manifested themselves while he was taking the second. The second mode in which the State suggests that arsenic may have been administered, was on that same evening in the coffee. Now, the coffee is subject to most of the remarks applicable to the syllabub. There has been no discovery of any poison ingredients in the residuum in the cup. And the same mysterious manner is assumed by the witness in speaking of this, as was done in the matter of the syllabub. But all that he says, in fact, stripped of his manner, is, that the servant by mistake brought to him a cup, intended by the lady of the house for her husband, and that, in rather an excited tone of voice, she said, "I say, Mr. Smith, that is Mr. Simpson's cup." The counsel has supposed the witness to have spoken of agitation in her manner. But the witness says nothing about agitation; and, as in the case of the syllabub, he furnishes us with a complete solution of anything that needs explanation, in relation to the

coffee. He tells us that he and others were workmen with Simpson, and boarded at his table; and it is very natural to suppose that between such boarders and themselves both Simpson and his lady would be disposed to make some difference. And it is very likely that Mrs. S. was a little more unguarded than her husband in showing this difference. And, accordingly, as Mr. Smith tells us, there were sometimes two coffee-pots, one containing stronger coffee than the other; and I have no doubt, if the truth was known, containing coffee of a little better quality than that used by the boarders. Be that as it may, she generally helped herself out of this coffee-pot, and sometimes shared it with Mr. Simpson, and with him only. Now we all know something of human nature, and although Mr. Smith says he was friendly with Mrs. Simpson, I hardly think these differences sat well upon him.

But it is worthy of remark, if Mrs. Simpson had been really desirous of poisoning her husband, taking care at the same time to poison no one else, the two coffee-pot system would have afforded her the very finest opportunity, and it is a little unaccountable that she should have chosen that very occasion, when, as the State supposes, she meditated poisoning her husband, as the one to dispense with the two coffee-pots. But Mr. Smith tells us that there was, by express agreement and understanding, a difference between the cup of coffee intended for Mr. Simpson and those given to the boarders. That Mr. Simpson liked his coffee sweeter, and it was so made. That, in consequence of this, frequent mistakes had arisen to avoid which it was determined that Mr. Simpson's cup should be sent last, and Mr. Smith was to take the first, and that in conformity with that arrangement, he took, on the occasion spoken of, the first cup that came to hand, and he has no doubt that Mrs. Simpson at first in an undertone told him that he had taken the wrong cup. But that he was attending to the conversation of two other persons, and did not hear her, and that for that reason it was as he supposes, that Mrs. Simpson spoke to him the second time in an excited manner. And does not that fully account for the circumstances? We trust it does fully and rationally. Is there anything in Mrs.

Simpson's forgetting on this occasion the arrangement of serving the boarders first and her husband last? Why, if she had designed effectually to secure a poisoned cup coming to Mr. Simpson, to the exclusion of anyone else, the very plan would have been to reserve his cup for the last; and all the rest being supplied, his cup must, of necessity, have found its right destination. So far, then, if guilty, from forgetting this arrangement, this was the time she would have best remembered it. But in the argument it was rather faintly urged that Mr. Simpson complained after taking the first cup and refused to take the second, and the impression was sought to be made, that the first cup of coffee had made him sick, and from thence to infer that it was poisoned. But remember it was proved that Mr. Simpson was a man of delicate constitution, and often complaining; and nothing that fell from the witness can connect his complaint of indisposition on that evening with the drinking of the coffee. His remark was that "he did not feel very well and could not drink another cup;" not that the first had made him sick. And the fact must have been so, for we do not find even the supposed symptoms of poisoning coming upon him for too long a time afterwards for poison to have been administered in the coffee. According to the testimony of the witness, he sat with the parties at least twenty minutes after supper, trying fortunes and in jocular conversation. He admits it was at least twenty minutes. I submit to you it was not much longer. The prisoner told Smith of a proposed visit on his part to a young lady; and when a pretty young woman like the prisoner condescended to amuse the witness, no doubt the time passed away with him very rapidly. Like Jacob, when he served seven years for a wife, which seemed to him but a few days, an hour or two with Mrs. Simpson would have seemed but as twenty minutes. No symptoms of illness until after the close of that entire interview had visited the deceased, nor during it, did he complain of anything unusual in his feelings and all that is known of the commencement of his attack is derived from the prisoner, who, with the frankness that has marked her whole course in this matter, stated that



his sickness began at early bed-time and continued all night. Schooled, as the State supposes her to be, by Mrs. Rising, she would have known the speedy effects of the arsenic, and would have endeavored in any account she gave of it to place her husband's sickness, as remote as possible from the time of taking the poison, but no one fixes the attack one moment earlier than she stated it. Indeed it seems probable, if she has erred at all, she has placed his sickness even earlier than the true time, for Dr. Mallett tells you that as late as ten o'clock the next day, he did not consider Mr. Simpson seriously ill. I think then, as in the case of the syllabub, it is demonstrative, not only, that there is no proof of arsenic being in the coffee, but the circumstances show that there could have been none. Will it be pretended that the arsenic was given at the time that Mr. Smith says she mixed the pill with syrup? Why, Mr. Smith himself expressly negatives the presence of arsenic there, for he says the appearance was as of a pill broken up and beaten into a syrup. There were no white particles such as are said to have been found in the stomach of the deceased, and, in fact, he represents the mixture to have been of a brown color. Besides that, after taking the pill the deceased was more easy, which tends to prove the total absence of arsenic, not only in the pill, but in any previous dose he may have taken. When, then, if the prisoner poisoned the deceased, did she administer the dose? To this question the State replies that she was his wife, had constant access to her husband, and may have done it at some time when no one was at hand to see it. This is all true. But does not this very fact, "plead trumpet-tongued against the deep damnation of his taking off?" Is it probable a woman would poison her husband? And does not the argument amount to saying to the prisoner we cannot prove your guilt, but you must prove your innocence? Alas! By whom can she prove it? The only person who could do it, as the very argument assumes is mingled with the dust. And if this mode of conviction be adopted who can be safe? It is as bad or worse than the French system, spoken of by my associate counsel who last addressed you. In Ann Burdock's case, the prisoner

was seen putting the yellow powders into the deceased gruel, and she was convicted. In Donnal's case, he was not so seen, and he was acquitted. Yet you are called upon to convict the prisoner without the slightest testimony that, under any circumstances, she was ever seen to administer anything to the deceased suspicious in its appearance. There is no case of administering to be explained, and yet we are required to explain it. And this necessarily does away with the fourth moral fact spoken of in the books—"the intent of him who administered the poison." For where there is no proof of administration, the question of intent cannot arise.

The fifth moral fact spoken of in the books, is the "simultaneous illness of other members of the family." But as this circumstance is altogether in the prisoner's favor, there being no such simultaneous illness of others, the State has framed her hypothesis upon the supposition that the prisoner was very careful to poison nobody but the deceased. As if such a murderess as they would have you suppose her to be, would be very anxious to avoid killing any one but the particular object of her malice.

The sixth moral circumstance to which authors refer is "Suspicious conduct in the prisoner during the illness of the person poisoned. He may prevent medical advice being procured, or relatives sent for. He may attempt to destroy food or drink, or vomited matter, which may have contained the poison." (Dean, 318.) Try the prisoner by this rule, and how does her conduct contrast with that of a supposed transgressor? She is the first person to send for a physician to her husband and, indeed, every one who approaches him, comes at her particular request; she invites many, she entreats them to stay with him. She frankly discloses to them every symptom of his disease with which she is acquainted, describing, as the physicians now say, the symptoms of poisoning. Voluntarily communicating that, which supposing her guilty, was the very thing to destroy herself—keeping back nothing, nor at all mitigating the character of his disease, and making no effort to conceal any of the excretions

from his body. But on one occasion, when, according to Mr. Smith, she had administered to him a pill, she deliberately examines, in the presence of Mr. Smith, what he throws up—calls Smith's attention to it, and expresses her satisfaction that he had not thrown up the pill. Did she believe that his stomach contained within it the evidences of guilty practices on her part, and would she not have been afraid to have called the attention of Mr. Smith to what came from it, lest he might discover the arsenic? On this branch of moral evidence the prisoner's conduct is not only free from anything suspicious, but is singularly marked with the very badges of conscious innocence.

But the State, having failed to show anything suspicious according to the past experiences and sound theories of men, has brought to your attention a new sort of suspicious matter—that is, that the prisoner took counsel of a fortune-teller, and professed to believe in fortune-telling; and among the foretold events placed the early death of her husband. The first in point of time, on this subject, is the testimony of Miss Register, who says, among other things, that the prisoner told her “that Mrs. Rising had told her fortune, and that she had informed her that she was to live with her husband five years, and five only; and that three of them were already gone, and now she believed it.” This was at a time when the prisoner was in much distress—when the future prospects of life looked gloomy before her. And who, gentlemen, when overtaken by great misfortunes, has not turned with superstitious awe to some past circumstance as to the forecast shadow of the sad event that has now overtaken him? Oh, what strange matter crowds itself upon the oppressed and desolate heart! The prisoner was bewailing in bitterness of spirit, at that moment, the dark cloud hanging over her earthly prospects, and as the natural refuge from self-reproach, said to herself and uttered aloud to her companion, “It is my destiny.” But was that destiny, that her husband should die in three years? And could she have intended by her expression to prepare the mind of Miss Register, or any one else, for his immediate

death? On the contrary, according to the prophecy as read to her, he had yet two years to live and his immediate death would be quite as unaccountable as if there had been no prophecy at all. Nay, even more so, for Fate had promised him two years more; and, if his life were then taken, it would not only violate the common course of nature, but the express promise of Fate herself. But the State is very easily satisfied; anything will fit. If the shoe is six inches too long, oh! what an admirable fit! It could only be made for the foot that now has it on. If it be an inch too short, still it is a most comfortable shoe, and was evidently intended for the present wearer. Those who are determined to see coincidence can easily find them; and one who is predisposed to believe that a prophecy of death in five years has distinct reference to a death which takes place in three, will have little difficulty in adapting any facts to any theory. Next comes the testimony of Mr. Smith, who heard the prisoner tell her husband—her husband, be it remembered, the man whose death she was compassing—that, “as he knew,” (for it seems to have been nothing new to him), “that her fortune had been told her, and that they were to have two children, who were to die, that a third was to be born and then he was to die.” If it was his death she was foreshadowing, and she really believed it was to happen, it was very benevolent in her to give him notice. For what purpose was this done? To put him on his guard, that he might elude his fate, or to warn him to make suitable preparations for the world to come? Is not this making mountains of molehills? The witness was told his fortune, too—was that fulfilled? It does not appear, but it is quite as much fulfilled as the one respecting her husband, for, according to that, he was to live to see another child born, which was to live; and yet, in despite of the prophecy, he dies before that child is born, and goes down to the grave hopeless of issue. But a sort of magic effect is given to this scene at the supper-table, which Mr. Smith describes, because it occurred at the very last supper at which poor Simpson was present. And notwithstanding Mr. Smith tells us that he then considered it a mere jocular affair, in which Mr. Simp-

son joined, it is plain, that to him and others subsequent events have given to it a strange and undue importance. Was she not in jest? Poor simple-hearted girl! Without considering that there were those around her, who were bottling up, as it were, every idle word that fell from her lips—every incautious act she might commit, susceptible of any bad interpretation, that they might there ferment and form, at some future time, a dangerous compound, which might be poured upon her to the destruction of her life—she spoke and acted from the impulses of a guileless heart. Like a lamb in its innocent gambols, cropping the flowers on the margin of a stream, she knew not that at each meander of that stream, couched amid the flowers among which she sported, lay hid a venomous reptile, ready to inflict upon her its mortal sting. But suppose she was serious in what she then said, who knows but there may reside in those grounds of coffee some mysterious power? Wise as we think ourselves—poor, short-sighted mortals that we are—we scarcely know what is or what is not. And it may be that in the arrangement of the grounds of coffee in that cup there was a dim foreshadowing of events to come. It was a most sad tale, poor thing, that she wove from the materials before her, such as they were. She saw not in that dim vista the former bridegroom, of whom so much has been said; she saw not for herself the bridal bower, nor the orange blossoms wreathed amid her lair; but she saw—and most sadly has it all been verified—she saw the husband of her love stretched upon a bed of sickness; she saw his coffin, and for herself a long, long, muddy road, leading her away and away to—God knows where, and skirted with murky clouds.

Next comes the testimony of Mrs. Ann Butler, the introduction of whom, if there were nothing else in this case, ought to satisfy you that this prosecution is not well founded. That the State should ransack the brothels and bawdy houses of the village to find such a witness and that they should hold on to her and press her testimony upon your consideration, after her character has been so fully exposed, is a thing to be noted. If she is believed, they tell you the fate of the pris-

oner is sealed. And yet, judging her testimony so important, strongly assailed as she has been in the cross-examination, they do not offer to sustain her character. Why have they not done so? Because they well know that the attempt would be worse than fruitless. The counsel for the State tell you she has admitted herself to be the mother of a bastard, and asks you, if for this, you will discard her testimony? Is this a fair statement of what she herself admitted? Did she say she was the mother of one? Was she not forced to confess herself the mother of a whole brood of bastards? She is not a repentant Magdalene, who had once transgressed, and then turned and asked forgiveness. But with shameless perseverance she has offended times without number, and stands before you condemned from her own lips. Will you believe her then? But, suppose her disposed to tell the truth. According to her statement, she overheard what the State said was a plot between Mrs. Rising and the prisoner against the life of the deceased. They either knew she was present, and so knowing, openly conversed upon the subject before her, whatever it might be; or, they did not know of her presence, and she was playing the eavesdropper upon them. If they knew of her presence they certainly were indifferent to her hearing what they said; and this must have proceeded either from a consciousness that what they were saying was innocent in itself, and they, therefore, cared not who heard it—or they knew that she was equally base with themselves, and if so, but little reliance should be placed upon her by you even if she had not been discredited by other proof. But suppose, as a listener, she overheard what they said, how easily might she have misconceived the language! She says the prisoner was complaining to Mrs. Rising of the ill-usage of the deceased, and that Mrs. Rising consoled her by saying that “If the prisoner would do as she said, the deceased would not live over a week.” How easily might the words, “Do as I tell you, and this will not last over a week,” be mistaken for what the witness says they were! This occurrence, if occurring at all, must have been during the quarrel spoken of by Miss Register, and we find that in less than a week the parties are re-

conciled; and, if Miss Register is right, the deceased must have lived about a month afterwards. Besides, whatever ill advice Mrs. Rising may have given Mrs. Simpson, there is no proof that she took it, and no person ought to be held guilty of a crime merely because another has advised them to commit it. But what did Mrs. Rising tell her to do? Was it to poison Mr. Simpson then? She certainly did not poison him then, for it was more than a fortnight afterwards that she purchased the arsenic. But, did she tell her to poison him at any time? There is no evidence that she did; and, of all testimony against an accused, there is none so dangerous as that which deals merely in dark hints, leaving everything vague and uncertain, and allowing suggestions to be made to the imaginations of the jury how the blanks shall be filled up. He who enters a dark chamber where no ray of light finds entrance, excite his imagination but a little and he will see visions that the brightest sun never revealed. This is the character of the testimony against the prisoner, and this constitutes the danger of her condition—a danger against which it behooves you to be on your guard. You are first asked from mere dark hints, to suppose that Mrs. Rising told the prisoner to poison her husband, although no such words are used by the witness and then, from thence to infer that she really did so. Mystery has a strange power over the human heart. Poetry stirreth it more than plain prose, and the magic of poetry consists in the shadowy vagueness of its descriptions, in the dimness and indefiniteness of the outlines of its pictures. These imagination loves to busy herself in completing, and will be certain to do so under some bias that she has received. But not only does the State ask you to draw such inferences from such meager materials, but even endeavors to keep out of your view the important fact, that, after all, the state of things under which Mrs. Rising's supposed advice must have been given had passed away, and that peace and harmony had been restored between the parties sometime before Mr. Simpson's death.

Next in the order of moral circumstances comes "the suspicious conduct of the prisoner after the person's death; as,



hastening the funeral, preventing an inspection of the body, giving a false account of the previous illness and other like circumstances." (Dean, 318.) Did the prisoner hasten her husband's funeral? Did she endeavor to prevent the inspection of the body? No, neither of these; on the contrary, the physician tells you that, not only did she submit it to external inspection, but evinced just as much, and no more, repugnance than an innocent woman would have evinced to a post-mortem examination of the body. The new-made widow is standing by the corpse of her deceased husband. The tears of grief are on her cheeks and she is told that the beloved form over which she is standing must be subjected to the hand of the anatomist, that the recesses of that bosom, once teeming with love for her, must be searched by the surgeon's knife, and, like an ox at the shambles, his flesh and his bones must be cut asunder. What woman would not start at the proposal? Do you wonder if she yielded a reluctant assent? But she is calmly reasoned with by the intelligent physician, in whom she has confidence, and she finally yields to the force of reason, and meekly replies, "Well, if you and Dr. Robinson think it important, I cannot withhold my consent." What woman, conscious of the guilty secret that that examination might reveal, would ever have consented? Would she not have clung with tenacity to that cold corpse, combated every argument that could be urged in favor of what she would have insisted was a wicked desecration of those sacred remains, and when all other arguments failed, have betaken herself to that most resistless of arguments—a woman's tears? But in dignified sorrow, the prisoner consented and the body was examined. Did she give to any one any false accounts of his illness? Have we not already shown you with what frankness she spoke of it during its progress? Nor did she ever afterwards change or deny what she then said. But the State failing in these indications of guilt, has again betaken herself to the mysterious, and brings up to you the conversation with Miss Arey. This lady tells you, with a frankness that does her credit, that she and the prisoner had been a little unfriendly; and yet we find the prisoner writes her to be with

her husband in his last moments, well knowing that if there were even slight grounds of suspicion against her, the jealous eye of this witness would be apt to see them, and that she would in nothing extenuate the circumstances of guilt. But the worst that Miss Arey saw in the conduct of the prisoner was, that as they retired from the chamber of death, and got to the prisoner's own room, the prisoner's tears suddenly became stanch'd, and she told the witness, "that her fortune, as it had been told to her by Mrs. Rising, was about to be realized—that some time ago she had told it to her, and that within a week past she had carried her some sugar and coffee, and that she had then told her that Mr. Simpson would die in a week and she would marry the man she had first loved."

Gentlemen, I know not if any one of you has lost the wife of his bosom. If there be such a one, he need not be told of the overwhelming nature of such a bereavement. How the very eyeballs are seared, and the moisture of the system dried up! How the heart is crushed, as it were, into bleeding fragments, and the brain smitten with an astonishment that for a time throws reason from her throne! Lesser griefs may find utterance in tears; but a grief such as this often lies too deep for tears, and can only find vent in strange and incoherent language. And because this poor young creature could no longer weep; and according to the true course of nature, past scenes with him, whom she had loved in life, now sleeping in death, are rushing upon her mind; and, because almost her first thought is of some act of her own, in which her heart reproached her with being less considerate of the feelings of the departed than she might have been, and she gives utterance to that thought by saying to the witness, "How little did I think, when Mrs. Rising was telling me my fortune, which I communicated in my giddy thoughtlessness, to poor Alec, that this first act in the sad drama was so soon to come to pass!" This, I am instructed to say, is the truth of the case, though by the unintentional omission of a few words, and the supply of others, in the memory of Miss Arey, the sense of the whole has been slightly changed. But, view it

as you will, it amounts to very little; and it scarcely admits of a second thought, that the prisoner, then in full possession of her reason, meant deliberately to say to Miss Arey, "Well, I am not much displeased that Mr. Simpson is dead; at least I shall not cry about it; for the same prophecy which foretold his death likewise informs me that I am soon to marry the object of my first and only love, to the accomplishment of which Mr. Simpson's death was a necessary prelude." And such must be the interpretation put upon her words, to give them any force.

The eighth class of moral facts is "the personal circumstances and state of mind of the deceased, his death-bed declarations, and other particulars." (Dean, 318.) That is to say, whether there is anything from which to infer suicide, or whether his death-bed declarations point to any one as the author of his death. I will not seriously insist, nor has it been seriously insisted by my associate counsel, that the deceased died by his own hand; but it is very certain that he did not charge any one else with having taken his life, and certainly not the prisoner. If she had been practicing on his life, think you not that he would have least suspected both the author and the means of his death? And yet, in the whole course of his suffering, he neither suggests the idea of his being poisoned, nor of the prisoner being concerned in its administration. How can you reconcile this with the supposed guilt of the prisoner?

The ninth moral circumstance, and perhaps the most important in the whole, is the motive that could have prompted to a deed so black. The State saw the importance of this, and has with great labor endeavored to find one. Those who act for the State well know that it would be impossible to make you believe that the prisoner had poisoned her own husband, unless they could supply a motive adequate to the production of such horrible consequences; and, accordingly, they have suggested one which they have altogether failed to prove. The State suggests that the prisoner, long before she saw the deceased, had given her young affections to another—that

friends interfered and prevented her union with the object of her choice—and that she consented to marry the deceased to obtain a home, a place of refuge from the inclement seasons, necessary food and comfortable apparel; but, false to her marriage vow, she became an adulteress—that the jealousy of her husband was aroused, and he threatened to dissolve the connection between them—that hatred and ill-will sprang up between them—and that, at the very moment of his death, the deceased and the prisoner were on unfriendly terms. And to all this was added a desire to remove an impediment to her union with the object of her first love. It is certainly true that this picture is very darkly charged, but, when we examine its various features, they will fade away, one by one, and scarcely any color will be left on the canvas. If there is any evidence at all that the prisoner ever loved another, it will be found in her declarations to Miss Register and to Miss Arey.

But here, we think, the overzeal of the prosecution has been peculiarly marked. Even as dark as may be what they have, in fact, attempted to prove, they stated in the opening of the case an expectation to prove that of which no witness has spoken, far more indicative of ungoverned love than anything of which they did speak. They told us that, in the conversation between Miss Register and the prisoner, the prisoner said to Miss Register (and, they led us to suppose, after the manner of a shameless wanton), “——— kisses sweeter than anybody I ever kissed.” But did Miss Register say that? And if she did not, was it for the want of an opportunity to do so? Were not great efforts used to obtain from Miss Register this, or something like it? She was asked several times, most significantly, if that was all she knew. And again, and again, she answered, Yes. And again, and again, was she brought up to the charge,—but in vain. Miss Register could prove no such thing. And this is but another proof of how the most exaggerated accounts have reached almost every mind, and facts imagined that have no existence. Then, grant it to be true the prisoner had once loved another,

but had been disappointed in her hope of marrying him, and even that the embers of that love were still glowing beneath the ashes that had been cast upon them. Nay, even admit that they sometimes, when blown upon by the breath of that lover, blazed up a little too intensely. Where is the woman that has married the man on whom, in her schoolgirl days, she first fixed her affections? And because she afterwards marries another, does it follow that she must prove faithless to his bed, and poison him to death? If such be the case, there are few husbands indeed who are safe, and it is high time that hanging were practiced on an extensive scale, to afford any hope of preventing their destruction. But that the prisoner was ever unchaste, where is the proof? From all this populous town, has a single witness been brought forward who ever saw in her an unchaste look, ever heard from her an unbecoming word, or ever witnessed in her even an indiscreet act? Not one. Who then will say that she is unchaste? It is true Miss Register tells us that, on a certain occasion, she entered a room with her and, having locked the door, produced a note from which she read, purporting to be from her husband—"I thought you loved me once, but now I have reason to think you love another better." He then goes on to say: "You can no longer be my wife, but, for the sake of your friends, I will not separate from you, but you must prepare a bed for me upstairs. I will furnish you with victuals, but you must find your own clothes." Does this prove her guilty of adultery? By no means. Doubtless some busy Iago is at the bottom of this affair. And this is proven by what she tells Miss Register about it the next day, "that somebody had been telling him some news that had made him angry." But does she herself plead guilty to this charge? No. She is taking counsel of Miss Register. She tells her this is their first disagreement. "Shall I," says she, "when he comes in, go up to him and kiss him, and see if he will speak to me?" How like the kind, noble, generous, forgiving woman! Though herself the offended party, how does she propose to act? Not to demand an apology, but to ask forgiveness. Like the humble chamomile, though trodden under

foot, she rises up beneath that tread a fragrant and healing balm to him who has oppressed her.

Yes, the heart of woman is a well-spring of kindness. It sends forth its streams over this parched and withered earth, and causes it to bud and blossom and put forth the fruit of good works. Woman is by far the better portion of our race, and if our sex were only like her, different, far different, would be the condition of the world. "Or, shall I," she meekly inquires, "do as he bids me, like an obedient wife, and prepare a bed for him upstairs? or must I take no notice of his note, and act as if I had never received it?" What aid Miss Register afforded her in this, her perplexity, does not appear, and here for the present the curtain falls. But the next morning, when probably her overtures of kindness had been rejected, and some new indignity offered her, the blow given perhaps, spoken of by some of the witnesses, she takes higher ground. And when Miss Register tells her she had better have no more to do with the object of her husband's jealousy, she replies: "It is not worth Mr. Simpson's while to turn a fool now; ——— has been visiting me ever since we were married, and Mr. Simpson need not make a fuss about it now." And when reminded by Miss Register that perhaps Mr. Simpson might murder ———, she replied, "Oh, he knows better." Is this the conduct and language of a hardened, guilty woman, conscious of adultery, and meditating murder? Is it not rather that of one maintaining her integrity? Mr. Simpson need not turn a fool now! Would he be a fool to object to the visits of a man whose intercourse with his wife he believed to be unlawful? If the prisoner were ever so wicked, she would not call this folly. She meant to say, "This gentleman has visited at our house ever since our marriage, nothing improper has ever occurred between us, and it is foolish in Mr. Simpson now to believe that there has or will." And when she says that "Mr. Simpson knew better than to kill ———," she but manifests her just sense of the binding force of the law, "Thou shalt not kill," and at the same time her belief that Mr. Simpson had too much

sense to be unmindful of it. Had she been conscious of any idea of murder, in her own mind, she would have been more ready to conceive its possibility in others. The next day Miss Register finds her packing up her clothes, and the piteous outpourings of her then almost broken heart are gathered up against her. How natural the mode adopted by her of bewailing her condition! "My fortune has been told me," said she, "and I was only to live with Mr. Simpson five years; three of them have passed away, and now I believe it." Why did she believe it, now? She had not believed it before, for her heart had rejoiced in the love of her husband; and, like all happy creatures, she had not believed that this happiness could ever pass away. But now that a dark, dark cloud had come between the sun and her, she feared that that cloud for the next two years would grow darker and thicker, and an endless night of misery would close in upon her. This was what she meant and this only. That husband whose tenderness she had before experienced, and in which she had confided, had charged her with infidelity, perhaps had struck her. All this had happened within the first three years of their marriage; what had she to look for for the time to come? Well might she anticipate an early dissolution of bonds that had been so rudely tried? If she meant that dissolution would be by death, she did not say so; and it is but conjecture to assume that she did. A few days more, however, and she is again in the house of her husband, and she tells Miss Register that they have settled all their difficulties. And thus had the deceased and the prisoner passed through a scene, rough, it is true, but not more so than is encountered by thousands of couples, the general tenor of whose life is peace and love and happiness. And, for aught that appears, love and confidence were permanently between the prisoner and the deceased. The inmates of the house speak not of a ripple on the quietness of their domestic scene. They were affectionate and kind to each other, and, according to Mr. Smith, even in the memorable conversation at their last supper, she calls him "Lovey," a term of endearment that she frequently used to him, and, for aught that appears, in perfect sincerity. At



any rate, it was well received by him, which would not have been the case had he believed her false and deceitful. Would he, had he not been satisfied of her innocence, have taken her again to his embraces? But farther, in this conversation with Miss Register, it seems to me Miss Register is placed in this dilemma: either these conversations took place in the innocence of the prisoner's heart, or she knew Miss Register to be no better than she should be and therefore a fit repository for her guilty secrets. Their intercourse was of but three months' standing, and yet we are asked to believe that, with the impression that Miss Register is a good and virtuous woman, the prisoner makes her the confidante of her amours. If Miss Register be a good woman, the prisoner intended no evil in what she communicated to her; if she be a bad woman, she is not entitled to your confidence.

But, according to Dr. Mallett, it is said that on one occasion, when the deceased was suffering greatly with nausea, the prisoner, who had watched over him with the tenderest care, laid her hand gently on his head, and that he turned pettishly away; on which she remarked, "Touch-me-not-to-night," or something of that sort. This is all the doctor discovered to attract attention; and I wonder that he should have thought that worthy of note—he, who knows so well how, in seasickness and other cases of nausea, the sufferer is incapacitated for every enjoyment, and desires nothing so much as to die unmolested. The most affectionate wife or husband that ever lived, under such circumstances, would turn away the head and give utterance to expressions of petulance. And a like occurrence was witnessed by Miss Arey. But she, it appears, when she came in, found the prisoner seated on the side of the bed by her sick husband, weeping and bending over him, and to all appearances doing all she could for his relief. And as a proof that he looked upon her as a friend, he implored her, among others, to do something for his relief, as he had done before in the presence of Mr. Smith. She did all she could. She gave him medicine, and expressed her satisfaction when she found that he had not thrown it up. So far, then, from there being any malice on the part of the pris-

oner towards her husband, at the time of his death their differences, which had been slight, had been entirely reconciled, which sweeps away every motive for the commission of the deed. And besides, if the life of Simpson was ever important to her, as affording her a home and the comforts of life, it had not ceased to be so; and so far then from the death of the deceased being desirable to the prisoner, his life was, to all appearance, of the utmost importance. And, so far from there being any signs of unkindness between them, she was his constant, kind and attentive nurse, through all his sickness, and scarcely left him but with life itself. From her hand he took, without suspicion, the medicine she prepared, and when he spoke of dying she affectionately bent over him and entreated him "not to talk so,"—not to despond, and thus render his condition more dangerous,—not to fill her with despair, by his gloomy forebodings. What, then, becomes of the proof of malice, and this evidence of guilt?

Another one of the moral circumstances relied on in the books is the declaration of intention. Nothing of this kind was ever heard from the prisoner, although something in the nature of threats is ascribed to her in the various conversations which have been already remarked upon. Viewing them as such, let me read to you from Best on Presumptions, page 184, a passage which seems to have been written in clearer prescience of the present situation of the prisoner than any prophecy the renowned Mrs. Rising ever uttered. The eleventh, twelfth and thirteenth of moral facts, to-wit, "unexplained appearances of suspicion, and attempts, falsely, to account for them; the suppression or destruction of evidence, and the simulation of facts," are entirely wanting in this case, and by their absence show that the prisoner was under no necessity to resort to them. This furnishes what may be called negative evidence in the prisoner's behalf.

I have thus, gentlemen, reviewed all the facts and arguments relied upon by the State, and suggested some occurring to my mind in behalf of the prisoner. I fear I have been tedious. But the prisoner has, in part, committed to me her

cause, and thereby, to some extent, trusted her life and character in my hands. I have felt anxious that nothing should be left undone by me, to save that precious life, and to place her innocence clearly before you. She is beset by circumstances of suspicion, not of guilt. These may endanger her, and I look upon her, and fancy her my own daughter pursued by a band of cruel and relentless enemies, and I feel as if I could throw my arms about her, and exclaim: "God help thee, poor innocent; they shall not hurt thee but at the sacrifice of my life!" I beg you, gentlemen, also, that you may be able to do her justice, to fancy her your own daughter, and ask yourselves what you would think of a jury who, under like circumstances, should find her guilty? This, as you have been frequently told, is a case of circumstantial evidence, and I desire, before we separate, to call to your attention some rules laid down in the books, for the proper use of circumstantial evidence. They may be found collected in *Wills on Circumstantial Evidence*, page 177.

The first rule is, that "The facts alleged as the basis of the inference must be strictly connected with the fact to be proved. Occurrences may be mysterious, and justly excite suspicion, but, inasmuch as the connection may be only apparent, every circumstance, which is not proved to be actually connected with the fact, in support of which it is alleged, must be rejected."

The second rule is, that "The burden of proof is on the party alleging any fact which infers legal responsibility." Hence the State must prove the prisoner to have perpetrated this deed, and not call upon her to prove that she did not.

The third and fourth rules have no application to this case.

The fifth rule is: "The circumstances proved must lead to, and directly establish, to a moral certainty, the particular hypothesis assigned to account for them; in other words, the facts must be of such a nature that their existence is absolutely inconsistent with the non-existence of the alleged moral cause, and that they cannot be explained upon any other reasonable supposition." Try the facts, established on the part

of the State, in this case, by this rule. May not everything proven by the State be perfectly true, and yet the prisoner be innocent? If this be so, how can you convict her?

The sixth rule is, that "The conclusion drawn from the premises, assigned as its basis, must satisfactorily explain and account for all the facts, to the exclusion of every other reasonable solution." Now, are not other solutions, which may be given to the facts proven by the State, quite as reasonable as that founded upon the prisoner's guilt?

The seventh rule is, that, "If there be any reasonable doubt as to the proof of the *corpus delicti*, or as to the results of the connection of the circumstances with the fact to be proven, or as to the proper conclusion to be drawn from those circumstances, it is safer, and therefore better, to err in acquitting than in convicting; or, as it is more properly expressed, that ten guilty men should escape than that one innocent man should suffer." To say the least of it, then, in this case, are there not rational doubts of the deceased having died of poison? and is it not even still more doubtful that the prisoner administered it? If any of you have gone into that box with your minds made up against the prisoner, determined to convict her, right or wrong, let me ask you to pause a moment and reflect. I cannot believe that there are any such; but, if there be, remember that the eye of God is upon you, and from Him you cannot conceal your guilty purpose; and if, upon grounds such as these you convict the prisoner, you will be a murderer more deliberate and cruel than she even if she be guilty. And if some of you should, upon the evidence, come to the conclusion that the prisoner is guilty, without any rational doubt in your own minds, still, if other members of the jury should entertain these doubts, and you cannot overcome them, it is your duty to yield to them, as I will convince you, by a passage from the opinion of our Supreme Court, in Ephraim's Case, reported in Vol. II of Dev. & Bat., page 171. In speaking of the necessity to discharge a jury in a capital case because they cannot agree, his Honor, Chief Justice Ruffin, remarks: "The power is not necessary or useful to pub-

lie justice; for if twelve men, indifferently chosen, after full argument upon the evidence and instruction from the Court upon the law, and opportunity for full deliberation, be not agreed of the guilt of the accused, he ought to be acquitted. The law anticipates a verdict in every case; and although, from the constitution of the human mind, it cannot be supposed that the evidence will make the same impression upon every juror, yet it is probable, by consultation, they will ultimately come to the same conclusion; if to no other, that the whole jury, upon the fair and invincible doubts of some part of their body, will adopt one favorable to the prisoner, since, in a case of real doubt, the law leans to the presumption of innocence." Thus, therefore, as I have said, if any of the jury entertain honest and invincible doubts, we have the highest authority for saying that it is the duty of the whole jury to adopt those doubts, and acquit the prisoner. And to such of the jury as may have come to the conclusion that the prisoner is innocent, or entertain doubts of her guilt, I would say, let not any fear of inconvenience from a long confinement—any desire to return to your homes—any longing after food or drink, induce you to yield to the convictions of others, and give up your own convictions of her innocence or doubts of her guilt, and thus literally barter away the life of this poor young creature for a piece of bread. But rather, with a firmness that the occasion warrants, die in her defense.

The last rule that I shall call to your attention is, that "Not only the verity of the facts, but their alleged mutual relations, should be submitted to the most rigorous scrutiny, and every possible objection to the correctness and relevancy of the alleged inferences from them should be boldly advanced and fearlessly discussed." On my part, gentlemen, I have endeavored to comply with this important rule. I have boldly grappled with the array of facts made by the State. I pray you to do likewise. This is a case entirely of facts, and the responsibility rests mainly with you. There is no dispute about the law. His Honor, no doubt, feels painfully the responsibility of his position. But he has no question of law

to decide. The law laid down by the State is not denied by us. If the prisoner has perpetrated the acts charged upon her, we have a law, and by that law she ought to die. And although, by reason of the tenderness of her age and sex, we could not withhold our tears for her fate, we should feel that she had forfeited all claims to our sympathy and justly merited her doom. But it is the facts that we contest, and that you have to decide. An allusion has been made to that figure of Justice above the Judge's seat, and you have been told that you are to decide, as the one or the other of those scales preponderates. Gentlemen, we do not so read the law. It is not a mere preponderance of testimony that will justify a verdict of guilty, when human life is in the issue. It must be clear, decided, and complete. When there is but a slight preponderance, you must suffer mercy to drop in a tear in favor of the prisoner, and restore the equilibrium. Gentlemen, into your hands we commit the prisoner—it is a precious deposit. I speak not of her fair body only, though that is much; but it bears within it a pearl of immortal price, for the purchase of which God himself poured out his blood. Deal with it accordingly. There she lies before you, almost lifeless, awaiting her doom. She hath no voice to give utterance to her entreaties, not for her life only, but for her good name, dearer than life—dear, not only to her, but to the many with whom she is connected. But, through us, her counsel, she is permitted to speak, and, we pray you, gentlemen, deal with her in mercy. And once more committing the prisoner to your hands, we conclude in the language of the law—“and may God send her a good deliverance.”

#### THE CHARGE TO THE JURY.

JUDGE BATTLE. Gentlemen of the Jury: I rejoice that this most laborious trial is drawing to a close. But I cannot but regret that I am called upon to charge you in a case so important, at this late hour of the night, when I fear that your mental and physical energies, as well as mine, are so nearly exhausted. I shall be as brief as possible, and shall detain

you only so long as may be absolutely necessary to discharge the duty which the law imposes upon me.

The prisoner at the bar is charged with the darkest in the catalogue of crimes—the murder by poison of her own husband. To this charge she has pleaded not guilty, and now protests her innocence. This charge preferred by the State, and this denial by the prisoner, form the issue which you are now, and have been for the last two days, engaged in trying. You will bear in mind, that it is incumbent upon those who prosecute for the State to prove the affirmative of this issue, and the proof must be such as to show that it is not even possible or even probable, but that is true, beyond a rational doubt. And this rational doubt is not the doubt of a credulous man, who is ready to believe everything, nor of a stubborn and foolish man, who will believe nothing, as we are told of the fool who “hath said in his heart that there is no God,” when “all Nature cries aloud through all her works, that there is a God;” but it is the doubt which is likely to influence the mind of a prudent man, when called upon to pronounce a verdict which may affect the life of a fellow-being. Proceed, then, gentlemen, to the performance of your duty, keeping this safe rule of the law constantly fixed in your minds.

The charge against the prisoner has been divided by the counsel into two distinct parts: first, that Alexander C. Simpson came to his death from the effects of arsenic; secondly, that the prisoner administered to him that arsenic. The State alleges that both parts of the charge are true. They must therefore both be substantially proved; and, if there be any reasonable doubt of the proof of either, the prisoner must be acquitted.

For the purpose of proving the allegation that the deceased came to his death from the effects of arsenic, the State relies upon the testimony of Drs. Mallett and Robinson, and the chemist, Dr. Colton. The testimony of these witnesses consists of two parts: first, their statement of facts coming within their own observation; and, secondly, their opinions, as men



of science and skill, upon facts observed by themselves, or stated by others. So far as they have testified to facts, their testimony depends upon their respectability and character for veracity. And here it is proper for me to say, that their veracity has not been questioned. No attempt has been made to cast the slightest imputation upon it. On the contrary, the witnesses are admitted to be highly respectable and honorable gentlemen, and both the counsel for the State and the counsel for the prisoner have complimented the clear, lucid and intelligent manner in which their testimony was given.

But, besides their statement of facts, the law has, for the purpose of ascertaining whether there was arsenic in the body of the deceased, and, if so, whether that was the cause of his death, allowed these witnesses to give their opinions as professional and scientific men upon the symptoms attending the last sickness of the deceased and the tests applied in analyzing the contents of his stomach. The witnesses all concur in the opinion that there was arsenic in the body of the deceased, and that that arsenic was the immediate cause of his death. The counsel for the prisoner contend that the witnesses are mistaken, that their opinions are unfounded, and to satisfy you of this they have referred to and read several medical works admitted to be of high authority. This the counsel had the right to do, but the authorities which they read, as well as those which were read by the counsel for the State, can be used for the purpose only of enlightening your minds, and thus enabling you the better to judge of the correctness of the opinions given by the witnesses. If, aided by these lights, you come to the conclusion that the tests applied in analyzing the contents of the stomach of the deceased were fallacious, or that there is a reasonable doubt of the correctness of the opinions of Mr. Colton and the medical witnesses, then the first material part of the charge made by the State fails, and the prisoner is entitled to an acquittal. But, if you think that the confident opinions expressed by these gentlemen are correct, then the allegation made by the State, that the deceased came to his death by means of arsenic, is fully

established; and, in that case, it becomes necessary for you to consider the remaining part of the charge—to-wit, that the prisoner administered that arsenic.

But, before we proceed to the consideration of the proof upon which the State relies to sustain this allegation, let me call your attention for a moment to the position taken by the counsel for the prisoner, that if the deceased did come to his death by poison, he committed the act himself. Now, gentlemen of the jury, you have heard the evidence, and the argument of the counsel in support of this position. If you are satisfied that Alexander C. Simpson did commit suicide, or if you think that there is a reasonable probability of that fact, then the prisoner must be acquitted; for if there be a reasonable probability that the deceased committed the act, there must necessarily be a rational doubt as to its commission by the prisoner and she is entitled to the benefit of that doubt; but if the counsel have failed to convince you that the deceased did the act himself, or that there is a reasonable probability that he did the act, then we must proceed to the inquiry, whether the State has produced testimony sufficient to satisfy you beyond a rational doubt, that the prisoner at the bar did it.

The bill of indictment charges that the prisoner administered the poison to her husband in syllabub and in coffee. But this does not preclude the State from showing that it was given in some other way. Yet, in this case, it is proper for me to remark, that there is no evidence of its having been given in any other way, and you may therefore confine your attention to the particular mode in which it is charged to have been administered.

The counsel for the State do not pretend that this part of the case is established by positive proof, but they rely mainly, if not altogether, for its support, upon circumstantial testimony. This makes it necessary that I should explain to you (who are probably not familiar with the subject) the nature of this kind of testimony, and show wherein it differs from positive testimony. Positive testimony, then, is, where the

fact that is sought to be proved is sworn to by some witness who saw it or heard it, and who therefore speaks of it from the evidence of his own senses. Circumstantial testimony is where the witness cannot testify to the fact sought, which may be called the main fact, from having seen it or heard it himself, but testifies to other facts which are called circumstances, from which the existence of the main fact is left to be inferred.

The term circumstance, from its derivation, signifies standing around. And a familiar illustration of it may be given from the practice of surveyors, in sometimes marking trees as corners to indicate a corner. The pointers are not themselves the corner, but they stand around it, and point out and show where it is. The law admits of proof by circumstantial as well as by positive testimony. Indeed there are many offenses, and offenses, too, of a very heinous character, which do not ordinarily admit of any other than circumstantial proof. These offenses would therefore go unpunished if such kind of proof were rejected, and the law would be untrue to itself if it denounced such offenses, and at the same time denied the only means of establishing their existence. The law, then, admits of circumstantial testimony, and the only thing it requires to justify you in convicting upon it is, that the circumstances must be so many, and of such a kind, as to produce conviction upon your minds, leaving no reasonable doubt of the truth of the fact. Absolute certainty it does not require. Absolute certainty no human tribunal can attain,—that belongs to God alone. Even in positive testimony, the witness, though bearing a respectable character, may, from the influence of some strong though secret motive, be induced to swear falsely, or he may be mistaken; yet a jury would be inclined to believe a respectable witness, and they would be justified in finding a verdict upon his testimony; nay, where there was nothing to impeach him, it would be their duty to do so. Circumstantial testimony is sometimes as strong as that of a positive kind; as in the case of violent presumptions, where the circumstance invariably attends the main

fact. In most cases it is otherwise, where there is but a single circumstance; but if the number of the circumstances be increased and varied, they may, at last, produce on the mind as strong conviction of the fact, as positive testimony. The case usually given in the books, as an illustration of circumstantial testimony, is where a man with a bloody sword in his hand is seen rushing from a room in which is found a person weltering in his blood, with a wound like that given by the thrust of a sword. Here no witness can testify that he saw the man with the bloody sword commit the act. There is no positive proof. The testimony is altogether circumstantial; yet it is very strong and might justify a jury in convicting upon it. The rule by which a jury should be governed in convicting upon such kind of testimony is stated to be, that it must produce as strong an impression of his guilt as would be produced by the positive testimony of one respectable witness; or, in other terms, supposing all the circumstances to be true, the case must admit of no reasonable hypothesis consistent with his innocence.

Taking this rule for your guide, let me call your attention to the circumstances which are relied upon by the State to establish the guilt of the prisoner. But let me premise, that each and every circumstance which is to be taken into the account must be proved to your satisfaction beyond a reasonable doubt; and it must be taken exactly as it is proved, with all the attendant circumstances which it may have. The first circumstance is, that the prisoner purchased arsenic, only a few days before the death of her husband, and thereby had the means of committing the act. This is derived from the testimony of James M. Smith, who states that on Saturday, the 3rd of November, 1849, she came into the store of Samuel J. Hinsdale, druggist, where he was clerk, and purchased of him an ounce of arsenic. The counsel for the prisoner insists that she purchased it to kill rats, for that she purchased it openly, declaring that to be her purpose, and had it charged to the account of her husband. These circumstances are also to be found in the testimony of the same witness, and if he is

to be believed, then the first circumstance relied upon by the State is, that the prisoner, five days before the death of her husband, purchased an ounce of arsenic openly, and had it charged to the account of her husband, declaring at the time that her purpose was to poison rats.

The second circumstance is to be found in the testimony of Nancy Register, and is relied upon by the State to show that the prisoner had a motive to destroy her husband. This witness deposes to the contents of a letter which the prisoner showed her, prior to the death of the deceased, and also to a conversation with her, in which she admitted that she loved another man better than she did her husband—that she had only married him at the solicitation of her friends, in order to get a home—and that he need not make a fool of himself now, as the man she loved had been visiting the house ever since she was married. The counsel for the defense contends that the conversation was misunderstood by the witness, and that, at all events, what the prisoner said admitted of an interpretation consistent with her purity. You, gentlemen, are to judge of the testimony, and to say whether you believe it, and, if so, what it proves. Whatever that is, you are to take as the circumstance which is to influence you in the final result.

Your attention is next called to the testimony of Samuel G. Smith, relied upon by the State to show the manner in which the poison was administered. You will inquire whether his statements in relation to the syllabub, the coffee, and the fortune-telling, foreboding, the sickness and death of the prisoner's husband are to be believed; and, if believed, whether they are to bear the interpretation placed upon them by the counsel for the state, or whether they admit of the explanation offered by the prisoner's counsel. The conclusion to which you come is to be taken as the third circumstance in the series.

The same witness (Samuel G. Smith) brings before you another circumstance which the State contends furnishes evidence to show that the prisoner administered arsenic to her

husband. It is the conversation she had with him at dinner, while her husband was sick, in which she inquired what effect arsenic would have upon anything to which it was given. It is for you to pass upon this statement, and give it the weight to which it is entitled. If it have any weight it is a circumstance against the prisoner; if not, it is to be rejected altogether.

Dr. Mallett testified that during Simpson's last illness the prisoner approached him and placed her hand upon his head; upon which he hastily turned his head aside and she exclaimed, "Ah! you are a touch-me-not, today!" This is relied upon by the State to show that there was an estrangement between them, and that she had not for him that sympathy and kindness which a wife ought to have for a husband. The prisoner's counsel insists that his conduct was merely the petulance and impatience of a sick man, and her remark idle and unmeaning. You will decide whether it is a circumstance to which any importance is to be attached.

Your attention is next called to the testimony of Miss Arey, who states a conversation which she had with the prisoner, immediately after the death of her husband; this is much relied upon by the State, to show that the prisoner had herself brought about the accomplishment of the fortune which the fortune-teller (Mrs. Rising) had foretold. The prisoner's counsel contend that the conversation was misunderstood and misrepresented—that it proved nothing, for that the prediction and accomplishment did not correspond. You will take it as you believe it to be established, in proof.

The next and last circumstance relied upon by the State is to be found in the testimony of Mrs. Butler. She states, in substance, that she lived next door to Mrs. Rising, the reputed fortune-teller, who is since dead—that the prisoner came very often to see Mrs. Rising to have her fortune told—that she came on one occasion not long before the death of her husband, and said that he had struck her in the mouth and that she intended to leave him. Mrs. Rising told her not to mind that, and that if she, the prisoner, would do what she told

her, he would not be a living man for a week. The character of this witness has been attacked by the prisoner's counsel, and it is insisted by them that the whole story is false. The counsel for the State contend otherwise, and say that if she is not to be believed, upon her own independent testimony, yet that she is strongly corroborated by the circumstances deposed to by other witnesses. It is for you to decide between them. If you disbelieve her, or have any reasonable doubt of the truth of her testimony, it ought to be set aside; but, if you believe that she has sworn the truth, then what she states forms the last circumstance in the series upon which your final determination is to rest.

These, then, gentlemen, are the circumstances which the State has brought before you to prove the guilt of the prisoner. In connection with them, you must also consider those which the counsel for the prisoner have urged before you as favorable to her. Among other things, they rely particularly upon the testimony of Dr. Mallett to show the readiness with which she consented to the post-mortem examination of her husband's body. They rely also upon the statement of the witness who saw the prisoner and her husband walking together an evening or two before his death, in connection with a part of the testimony of Miss Register to show that they did not live together upon the terms insisted upon by the State. These circumstances, gentlemen, or as many of them as have been proved beyond a rational doubt, you are to consider, not separately, but all together. Each by itself may have but little weight, while united they may have much force. They have been compared to a chain whose strength consists in the connection of all its links. They may also be compared to a bundle of reeds. Taken separately they may be easily broken. Taken together they may defy a giant's strength. You will consider all the circumstances upon the testimony given in the cause. You must not permit yourselves to be influenced by any other consideration. If the testimony, when fairly, fully and impartially examined, leave upon your minds any reasonable doubt of the prisoner's guilt, it is your duty to



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acquit her. But if you have no reasonable doubt, from the testimony, that she knowingly and wilfully poisoned her husband, then you are bound, regardless of the consequences, to render your verdict that she is guilty.

### THE VERDICT.

At 3 o'clock a. m., the charge of the Court being closed, the *Jury* retired, and at 6 a. m. resumed their seats in the box, having agreed upon a verdict of *Not Guilty*, which, being rendered and recorded in open court, the prisoner was discharged.

## THE TRIAL OF WINTHROP S. GILMAN AND OTHERS FOR RIOT, ALTON, ILLINOIS, 1838.

### THE NARRATIVE.

Elijah P. Lovejoy\* was a native of Maine and a Presbyterian clergyman who had settled in St. Louis and founded a religious newspaper called *The Observer*. His editorials denouncing Roman Catholics and their dogmas very naturally provoked much resentment in a city so largely Catholic as St. Louis<sup>b</sup>; but they led to no tumult or violence. But when he began to attack slavery, his views mortally offended

\* LOVEJOY, ELIJAH PARISH. (1802-1837.) Was born Albion, Kennebec Co., Maine, one of the nine children of Rev. Daniel Lovejoy, a Congregational minister. His mother was Elizabeth Pattee, of the same neighborhood. Young Lovejoy's early life was spent in rural New England, and he graduated from Waterville College in 1826. He went to St. Louis in 1827 and began teaching, occasionally writing for the press. In 1832 he decided for the ministry and that year entered the Princeton (N. J.) Theological Seminary. He was licensed to preach by the Philadelphia Presbytery in 1833 and returned to St. Louis, establishing in November of that year the *St. Louis Observer*, a religious journal. His articles on slavery called forth a protest from some of his most influential subscribers, but he paid no heed to it and continued his philippics; but as financial support was withdrawn from his paper he concluded to remove it to the town of Alton, in the free state of Illinois. He took his press there, but the next day after it was landed on the bank of the Mississippi, it was destroyed and thrown into the river. A public meeting of citizens was held and a pledge was given to make good his loss, but resolutions were carried condemnatory of Abolitionism. Mr. Lovejoy assured the meeting that he was not an Abolitionist as they understood the term, and had not come to Alton to establish an Abolition paper, but that he was an enemy to slavery and expected to live and die one. But two other printing presses which he purchased and brought to Alton were destroyed by bands of citizens within a few months.

On October 6th, it became known that a new press was to arrive that night. The rioting on the previous occasion and the fact that the town had no police force to prevent it, had led to the organization of a small military company, which elected Enoch Long, a veteran of the War of 1812, as its captain. Mr. Gilman, the owner of

the slaveholding community in which he resided, and the citizens made it so hot for him that after a few months he decided to cross the Mississippi to a free State and to remove his residence and newspaper to the town of Alton, Illinois.

He soon found that public opinion there was just as strong against his views as in the Missouri city, for, when his printing press arrived, an Alton mob met it at the steamboat land-

the warehouse at the landing where the press would be received, was a member of this company. These men were on "duty at the warehouse of Godfrey, Gilman & Co. on the night of Nov. 6th, when the fourth press was landed, and saw it safely stored on one of the upper floors. Mayor Krum was present with Mr. Gilman and superintended the work, and all the precautions against unlawful interference were taken with his knowledge and sanction. Alton then had no police force whatever. The volunteer guard remained in and about the building all the next day—the fatal 7th—and drilled there as late as nine o'clock in the evening. Then, as everything was quiet and no indication of coming trouble, they were all on the point of going home. Mr. Gilman, however, requested a few of them to stay on the premises as protection against possible attack. Nineteen did so, making, with Mr. Gilman, twenty.

"Very soon, however, there were unmistakable signs of a hostile gathering outside, and these were speedily confirmed by the appearance of two citizens, Edward Keating and Henry West, who asked to see Mr. Gilman. They were admitted and in the interview told him that unless the press was given up the house would be burned and all within put in peril of their lives. The demand was refused, and the envoys retired. Wild shouts now told the little band of defenders what was before them. . . . The first attack of the mob was made at the north end, or street front, of the warehouse by an attempt to batter down the heavy door preceded by a shower of stones, interspersed with more deadly missiles from gun and pistol. Capt. Long, merciful in his policy, ordered one shot to be fired in return, and that shot killed a man in the crowd named Bishop. This scattered the assailants temporarily, but they soon returned with reinforcements, and the assault was renewed with redoubled energy. There was firing now on both sides, but nobody was hurt thereby. At this juncture the Mayor came into the building and was urged to take the defenders outside to face and fight the mob, or else in the hearing of the mob to give the defenders order to fire. He declined unwilling as he said, to jeopardize the lives of the little company. Returning to the attacking party, he ordered them to disperse, and was laughed at for his pains. A ladder was now raised on the east side of the building in the vacant lot, and a man was sent up with material to fire the roof. Knowing this, Capt. Long called for volunteers to go out and dislodge the incendiary. Lovejoy, Roff and Weller promptly responded and stepped from a lower door upon

ing, broke it up and threw the pieces into the river. A second press was gotten safely to the office, but only a few issues of The Observer had been printed from it when a band of fifteen or twenty persons broke in the night into the building and destroyed the press and type. A month later a third press which was brought to Alton met the same fate.

On October 6, 1837, it became known in the town that a fourth press for The Observer was on its way from St. Louis. Mr. Lovejoy and a friend went to the Mayor and notified

the levee, there about fifty feet wide and separating the warehouse from the river. Lovejoy went first and furthest, his companions being between him and the door. They, some or all of them, fired at the man upon the ladder, but did not hit him. While standing thus in the bright light of a full moon, the party was fired upon by two or three men, concealed behind the pile of lumber before mentioned, and resting their guns upon it. Roff and Weller were both slightly wounded. Lovejoy, evidently the mark aimed at by the assassins, received five balls (buckshot) in the body and limbs. He turned, ran past his companions, through the door, up a short flight of stairs into the counting room, exclaiming: 'My God, I am shot!' was caught in the arms of some one who rushed to his aid, laid upon the floor, and died without a struggle, and without uttering another word. With him died the inspiring spirit of resistance, and when a few moments later, Keating and West again presented themselves and offered to spare the building and allow the garrison to depart, unharmed, if the press were given up, Mr. Gilman, as owner and custodian of the other property involved, accepted the terms and hostilities ceased. The defenders, with the exception of the two wounded men, Thompson, who stayed until the mob took possession, and Hurlbut, who remained in charge of his dead friend and chief, passed out upon the levee and went in various directions, fired at until beyond range, but fortunately without effect. The press was, of course, destroyed.

"Lovejoy's corpse lay upon a cot in the counting room of the warehouse until the next day (the 35th anniversary of his birth) when it was removed to his residence. The funeral service consisted of prayers only: there were no remarks which might have provoked the mob, some of whom were near at hand. The body was buried in a graveyard a short distance away, between two large oak trees, one at his head, the other at his feet." Many years later, the old cemetery having been cut up into town lots, the bones were removed to another cemetery and a stone erected by Mr. Thomas Dimmock of St. Louis, with this inscription "*Hic Jacet Lovejoy, Jam parce sepulto.*" "Here lies Lovejoy, spare him now that he is buried." In 1885 Mr. Dimmock conveyed the lot to the colored people of Alton in trust. Dimmock's Lovejoy, p. 23, 25.

"Lovejoy had married, in 1835, Miss Celia Ann French of St. Charles Mo., and had an infant son. She died many years ago in

him of its expected arrival at the warehouse of Godfrey & Gilman, on the river-front, and of the threats to destroy it, and requested the appointment of special constables to protect it. The Mayor reported the matter to the City Council at a called meeting, but that body did nothing. About the same time Mr. Gilman told the Mayor that a score or more of citizens who, a short time previous, had formed a volunteer military company to preserve order in the town, would be at the warehouse the next night prepared to defend the property with their lives, and the Mayor replied that the law gave them the right to defend themselves in that way if they or the property they were guarding were unlawfully attacked. The press was landed and stored in the Gilman warehouse, but that night the mob assembled around the building and began to hurl stones at the windows. Soon a gun was fired and then others, whereupon one of the defenders discharged his piece and killed one of the mob. The crowd then withdrew, but soon returned and, placing a ladder against the building, attempted to set fire to the roof. Lovejoy and two or three of his supporters in the warehouse made a sally to prevent this, during which Lovejoy received several balls in his body and died a few minutes later. The men in the building then beat a hasty retreat; the mob entered unresisted, and the press having been thrown from the window, was broken to pieces with a sledge hammer.

great poverty, never having entirely recovered from the effects of the terrible events of 1836-37. The son, I knew as a boy, but after diligent inquiry, have been unable to obtain any trace of him. He is probably dead." Dimmick's Lovejoy (1888).

<sup>b</sup> Editorial on Nunneries, *Observer*, June, 1835: "We care not in whose hands they are, Popish or Protestant, they tempt to sin all who are connected with them. Talk of vows of chastity in chambers of impenetrable seclusion and amidst bowers of voluptuousness and beauty! 'Tis a shameful mockery, and especially with the records of history spread out before us. For that informs us that the nunnery has generally been neither more or less than a seraglio for the friars of the monastery."

Same, Sept. 8th, 1837: "When the Popish cathedral in St. Louis was consecrated on the Sabbath day, amidst the pomp of military array, the trampling of cavalry, and the sound of fife and drum, we published an account of this shameful desecration of the Lord's day."

The next month Mr. Gilman and the other defenders of the warehouse were indicted by a grand jury for riot, and in January were placed on trial in the Alton City Court. The Attorney General of the State took charge of the prosecution, but the defendants were able to show that they were acting under what they believed to be the instructions of the Mayor that they had the right to defend themselves. They were promptly acquitted by the jury.

### THE TRIAL.<sup>1</sup>

*In the Municipal Court of Alton, Illinois, January, 1838.*

HON. WILLIAM MARTIN,<sup>2</sup> Judge.

*January 16.*

The following persons had been previously indicted for the crime of riot, in "unlawfully, riotously and routously and in a violent and tumultuous manner" resisting an attempt to

<sup>1</sup> *Bibliography.* \*"Alton Trials of Winthrop S. Gilman, who was indicted with Enoch Long, Amos B. Roff, George H. Walworth, George Whitney, William Harned, John S. Noble, James Morse, Jr., Henry Tanner, Royal Weller, Rueben Gerry and Thaddeus B. Hurlbut, for the Crime of Riot, committed on the night of the 7th of November, 1837, while engaged in defending a printing press from an attack made on it at that time, by an armed mob. Written out from notes of the trial taken at the time by a member of the bar of the Alton Municipal Court. Also the trial of John Solomon, Levi Palmer, Horace Beall, Josiah Nutter, Jacob Smith, David Butler, William Carr and James M. Rock indicted with James Jennings, Solomon Morgan and Frederick Bruchy, for a riot committed in Alton, on the night of the 7th of November, 1837, in unlawfully and forcibly entering the warehouse of Godfrey, Gilman & Co., and breaking up and destroying a printing press. Written out from notes taken at the time of trial, by William S. Lincoln, a member of the bar of the Alton Municipal Court. New York: Published by John F. Trow, University Press, 36 Ann street. 1838."

"Memoir of Rev. Elijah P. Lovejoy, who was murdered in Defense of the Liberty of the Press at Alton, Illinois, Nov. 7, 1837. By Joseph C. and Owen Lovejoy, with an introduction by John Quincy Adams, New York. 1838."

"Lovejoy. An address delivered by Thomas Dimmock at the Church of the Unity, St. Louis, March 14, 1888." Sampson Collection, Hist. Soc. State of Mo., Columbia, Mo.

<sup>2</sup> MARTIN, WILLIAM. Settled in Alton from Utica, N. Y. about

break up and destroy a printing press, and in the same way resisting an attempt to force open and enter the storehouse of Benjamin Godfrey and Winthrop S. Gilman, in Alton, Illinois: Winthrop S. Gilman, Amos B. Roff, George H. Walworth, George H. Whitney, William Harned, John S. Noble, James Morse, Jr., Henry Tanner, Royal Weller, Reuben Gerry, Thaddeus B. Hurlbut and Enoch Long.

*U. F. Linder*,<sup>3</sup> Attorney General; *F. B. Murdock*,<sup>4</sup> City Solicitor, and *Samuel G. Bailey*,<sup>5</sup> for the People. *G. T. M. Davis*,<sup>6</sup> *A. Cowles*<sup>7</sup> and *J. W. Chickering*,<sup>8</sup> for the Defendants.

1832. Studied law under G. T. M. Davis. Began practice 1833. First Judge of Alton Municipal Court 1838. Mayor of Alton 1841. Member 15th General Assembly (Ill.) 1848-1850. Practiced law in Madison County, Ill., until his death in 1855. See Brink Hist. of Madison Co.

<sup>3</sup> LINDER, USHER F. (1809-1876.) Born in Elizabethtown, Hardin County, Ky., near Abraham Lincoln's birthplace. Went to Greenup, Coles County, Illinois in 1835. Served several terms in the Legislature with Abraham Lincoln, Stephen A. Douglas and other prominent men. Was elected Attorney-General in 1863. Rode the circuit in many of the Southern counties of the State. Secretary first Constitutional Convention. Brilliant, well-trained lawyer. Great stump orator. Knew Lincoln well and delivered address before Chicago Bar which won considerable commendation at time of Lincoln's Assassination. Author of "Reminiscences of the Early Bench and Bar of Illinois," 1879. Moved to Chicago in 1860 and remained there until death.

<sup>4</sup> MURDOCK, FRANCES B. Member Madison County, (Ill.) Bar several years prior to 1841. City Solicitor Alton 1838. Removed to St. Louis 1841. Later moved to California where he died.

<sup>5</sup> BAILEY, SAMUEL G. Born New Hampshire. Settled in Alton from Pennsylvania in 1838. Mayor of Alton 1842. Practiced law in Alton until his death in 1846.

<sup>6</sup> DAVIS, GEORGE TRUMBULL MOORE. (1810-1888.) Born La Vallette, Malta, his father being at the time Consul General of Tripoli. Educated at Yonkers, N. Y., and was clerk in store at Syracuse, N. Y. Admitted to Illinois Bar and began practice in Alton 1832. Mayor of Alton 1844-1846. Volunteer in Mexican War and military secretary to General Quitman. Civil and Military Governor of Mexico. Chief Clerk United States War Department 1851, and was the first to employ females as clerks in that office. Removed to New York and then to Kentucky. Editor of Louisville Courier 1852. President Woman's Hospital, N. Y. 1884-1888. Vice-President Adirondack Railroad and Secretary Oregon and Pacific Railroad. Personal friend of Daniel Webster, Henry Clay, John C. Calhoun,



The following Jurors were selected and sworn: James S. Stone, Timothy Terrel, Stephen Griggs, Effingham Cock, George Allcorn, Peter Whittaker, Horace W. Buffum, Washington Libbey, Luther Johnson, George L. Ward, Anthony Olney and Jacob Rice.

*Mr. Davis* moved that W. S. Gilman be given a separate trial from the others indicted with him. This was a legal right, and it was necessary for the complete, full and perfect justification of his client.

Intent entered into the composition of the offense with which he was charged, and he could in no way, so well as by a separate trial, show how utterly devoid he was of any criminal intent in the commission of the acts for which he here stood indicted as a criminal. If denied his application, he might suffer injustice and wrong, inasmuch as the exercise by the individuals indicted jointly with him, of their separate rights to peremptory challenge, might conflict with the formation of a jury by which his acts were to be judged.

The COURT. The motion is granted.

A plea of Not Guilty, individually, nor jointly, with the others named in the indictment, was entered for each defendant.

Stephen A. Douglas and Abraham Lincoln. Author of an Autobiography, published in New York (1891) where he died.

<sup>7</sup> COWLES, ALFRED. (1787-1887.) Born Connecticut. Settled first in Belleville, Ill., then removed to Alton. Assistant Attorney General and active practitioner for many years. Moved to Chicago in 1844 and formed partnership with William H. Brown. Registrar land office (Chicago) 1849-1853. Moved to California in 1853 and at the age of 93 presided over a Republican Convention at San Diego. He died there aged 100 years and two months and is said to have retained his physical and mental activity to the last.

<sup>8</sup> There is probably an error here in the original report of the trial which names G. W. Chickering as one of the counsel. In the list of those who became residents of Alton prior to 1840, Brink ("History of Madison County") gives the name of John W. Chickering. And Norton ("Centennial History of Madison County") mentions John W. Chickering as one of the lawyers. John W. Chickering settled in Alton from the East in 1835. Practiced law there until 1843, when he removed to Chicago. Was Master in Chancery and United States Commissioner and partner of O. R. W. Lull.

MR. MURDOCK'S OPENING.

*Mr. Murdock.* The defendant is indicted<sup>o</sup> for a violation of the 117th section of the Criminal Code of this State, which runs in these words: "If two or more persons actually do an unlawful act with force or violence against the person or property or another, with or without a common cause of quarrel, or even do a lawful act, in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot, and, on conviction, shall severally be fined not exceeding two hundred dollars, or imprisonment not exceeding six months."

<sup>o</sup> The Grand Jurors chosen, selected and sworn, in and for the body of the City of Alton, in the county of Madison, in the name and by the authority of the People of the State of Illinois, upon their oaths present, that Enoch Long, Amos B. Roff, George H. Walworth, George H. Whitney, William Harned, John S. Noble, James Morse, junior, Henry Tanner, Royal Weller, Reuben Gerry and Thaddeus B. Hurlbut, and Winthrop S. Gilman, all late of the City of Alton, in the county of Madison and State of Illinois, on the seventh day of November, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms, at the City of Alton aforesaid, and within the corporate limits of said city, unlawfully, riotously, and routously, and in a violent and tumultuous manner, resisted and opposed an attempt then and there being made to break up and destroy a printing press, then and there being found the goods and chattels of—contrary to the form of the statute in such cases made and provided and against the peace and dignity of the people of the State of Illinois.

And the jurors aforesaid in the name and by the authority aforesaid, upon their oaths aforesaid, do further present, that Enoch Long, Amos B. Roff, George H. Walworth, George H. Whitney, William Harned, John S. Noble, James Morse, junior, Henry Tanner, Royal Weller, Rueben Gerry, Thaddeus B. Hurlburt, and Winthrop S. Gilman, all late of the City of Alton, in the county of Madison and State of Illinois, on the seventh day of November, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms, at the City of Alton aforesaid, and within the corporate limits of said city, unlawfully, riotously, routously, and in a violent and tumultuous manner defended and resisted an attempt then and there being made by divers persons, to the jurors aforesaid unknown, to force open and enter the storehouse of Benjamin Godfrey and Winthrop S. Gilman, there situate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

You perceive, gentlemen of the jury, that the indictment charges in each count a distinct offense. In the first it is alleged that the defendant, with others, unlawfully, riotously, and in a violent and tumultuous manner, on the 7th day of November last, resisted and opposed an attempt made by divers persons to break up and destroy a printing press, then being the property of Benjamin Godfrey and Winthrop S. Gilman; and in the second count it is charged against the same individuals, that they in the same violent and tumultuous manner defended and resisted an attempt then and there being made by divers persons to break open and enter the storehouse of Godfrey & Gilman. The charge is for an unlawful defense of property—unlawful, because violently and tumultuously done. The defendants had a right to defend their property—every individual has. The offense consists in doing the act in a manner not sanctioned by law, but in direct violation of its letter and spirit. They assembled at the storehouse of Godfrey & Gilman, armed with muskets and rifles, with the acknowledged intent of using them in defense of property; and they did use them. The assembly of such a body of men armed in this manner, and for the avowed purpose of defending property from destruction, was calculated greatly to excite the feelings of the community, and to lead to a breach of the peace.

The counsel for the defense will place their justification upon the principles of the Common Law of England, which recognizes the right of every individual to defend his own house from a violent intrusion, and also to assemble his friends to aid him in its defense. This rule of law was established in a barbarous age, when man fought with man, and clan was arrayed against clan. Then, every man's house was his castle and protection, and men were justified in using more violent means in defense of their homes and their firesides, than in protection of other property. But, gentlemen, I take the broad ground, that the common law of England, so far as it relates to crimes, has no force in the State of Illinois. This is the opinion of many of the ablest lawyers of

the State. No one will say that an individual can be indicted at common law in our courts. We have a Criminal Code of our own, and unless the crime be defined and punished by statute, it is not an offense here. The first clause of the Criminal Code is in these words: "That the following shall, from and after the first day of July next, constitute the code of criminal jurisprudence of this State." The Legislature intended to establish a new system of criminal law, to define crimes, and fix their respective punishments. And when the Legislature said that a "violent and tumultuous" defense of property shall constitute a crime, it said that the law, and the law only, shall be every man's castle and sure protection; and the section under which these defendants were indicted was enacted for the purpose of providing for the punishment of such, who, not relying upon its power to protect their rights, endangered the peace of society by the use of violent means. The facts, gentlemen, the People expect to prove, it is unnecessary for me to detail to you. You are all familiar with the melancholy history.

#### THE WITNESSES FOR THE PEOPLE.

*Edward Keating.* On the night of the 7th of November last went into the storehouse of Godfrey Gilman & Co.,<sup>10</sup> accompanied by Mr. Henry H. West; saw in the store a number of people, eight or ten of them armed. Mr. Gilman inquired for and came down from above to see us; he was not armed. We went to apprise Mr. G. and the rest, that the storehouse would be blowed up or burned, if the press was not giv-

en up. Gilman expressed great surprise that such a proceeding should be thought of, and that the citizens of Alton would allow such a thing. He said they would defend the property, if necessary, with their lives. This was an half hour before the mob assembled; saw there Messrs. Gilman, Tanner, Walworth, Lovejoy and the other persons named in the indictment. All had arms except Gilman; saw no guns

<sup>10</sup> "The firm of Godfrey, Gilman & Co. was then one of the best known in the West for extent of business and financial responsibility. The senior partner, Captain Benjamin Godfrey, has a noble and endearing monument in Monticello Seminary, in the village bearing his name, which he erected and donated to the cause of female education at a time when education of any kind in the Valley of the Mississippi received comparatively little attention." Dimmock's Lovejoy, p. 19.

stacked up in any part of the room; left the building and went to my office. Soon heard the report of firearms; first a pistol, and immediately after a gun; these were from those outside, from the sound of the report; immediately after the report of the second gun, heard a third and exclaimed as I sprung to my office window, that must be from the inside; heard as I raised my window the cry that a man was shot; soon heard another gun fired from the inside and a man immediately cried out he was wounded; went down stairs and out and met persons carrying the body of Bishop to the office of Dr. Hart. The mob had dispersed generally; stood a few moments and then returned to my office; heard a rush upon going to my window, found the mob had again assembled; went out and joined the Mayor who was addressing the crowd. We stood a little while—a gun was fired, the shot whistled about and came close round us. Soon saw another gun, pointed in the direction in which I stood, flash, and I decamped. These shots came apparently from the corner of the warehouse next the river—were fired in the direction of those attacking the building, and appeared to be fired at some people who were engaged in raising a ladder to the roof of the warehouse. The press was soon afterwards given up; went into the building and found there Mr. Weller, one of its defenders; he was wounded and was sitting in a chair bathing his leg; don't know whether I saw any others in the building than those indicted; was informed before Gilman came down stairs by some of

those whom I saw there, that they had assembled to defend the press, but that they did not expect any attack that night. Gilman not only said they had assembled to defend the press, but that they should do so, if it was necessary, with their lives. Each man whom I saw, except Gilman, had a gun. The doors were not "blockaded," and I was astonished at the little preparation for defense; had made up my mind an attack would be made that night before it actually took place.

*Cross-examined.* Walking the street that evening I met five or six persons, and I felt confident that an attack would be made, and in the manner I have related. My object in going to the warehouse was to let those inside know that unless the press was given up, there was danger the building would be burned or blown up. Such was the rumor. When the Mayor was addressing the people outside, saw four of five guns in the hands of individuals in the crowd; the mob first armed themselves with stones; saw the preparation to burn the building, it was after the time I now speak of. There were cries to burn the building, and from a great many voices; they were given at the onset, after Bishop was shot. Gilman appeared to be very much astonished at the communication I made to him. He said they would defend the press, if necessary, with their lives. He asked Mr. West to call upon the Mayor, and request him, from them, to summon the people to suppress the mob.

To *Mr. Linder.* Saw no attempt to fire the building till Bishop was killed; nor did I see

any intention to use firearms till then; saw no arms till the period when the Mayor was addressing the crowd; knew of the intention to blow up, or set fire to the building, and communicated such knowledge to Gilman before the mob assembled.

To *Mr. Davis*. On the night of the 6th was down upon the bank of the river, a number of people were there together. I talked with one who had a club; told him that his stick was not much of a weapon, or some such thing. He dropped his club and showed me a pair of pistols in his dress about his body. An order was soon issued by some one of them, "Forward march. Let's go up to H—, and get some drink." They marched off, but soon came back again,—had further conversation in which they said they were waiting for the press; at this time there were ten or fifteen people assembled; I had pocket pistols, I carry them always.

*Henry W. West*. On the night of 7th November about eight o'clock was standing in my store door. John Solomon passed, and said he believed there would be a mob that night, and that preparations were making to burn or blow up the warehouse unless the press was surrendered, and that the building would be destroyed, unless the press should be given up; said Gilman had been friendly to him, and he did not want to see him injured, or his property destroyed; urged me to go up and tell Gilman. With Mr. Keating I went into the warehouse and told Gilman the rumors and the circumstances. Gilman replied that he had thought the matter over seriously, and he

should not give up the press but should defend his property at the risk of his life; returned to my store. Soon started to go to the warehouse again; met Dr. Beall and asked him to use his influence to suppress the mob, to get them to disperse; he replied he could have no influence and would have nothing to do with it; went up to and into the warehouse. The mob came while I was in the warehouse—a stone was thrown against the door. I think Gilman went to the garret door, opened it, and asked them what they wanted. The mob replied, the press. Gilman said it did not belong to him, it was stored with him, and he should defend it. The mob said they would have it, and started off round the corner to the other front of the store. At this time pistols were fired, then a gun from the mob, and Mr. Gilman requested me to go and see the Mayor. After some time went again into the warehouse with Mr. Krum, the Mayor and Mr. S. W. Robbins. The Mayor had some conversation with Gilman; when I first went to the warehouse saw there Walworth, Long, Morse, Tanner, Lovejoy, Gilman and others; most of them were armed, principally with muskets or rifles; don't know whether their arms were loaded; saw some guns standing in the room stacked. When the firing commenced was in the third story of the warehouse. There was firing by those inside while I was there, though not a rapid discharge. One gun only was first fired. Some individual inquired, "who fired that gun?" "I," was replied by some one, but by whom I don't know. Shortly afterwards there were

two or three guns fired from another part of the warehouse than that in which I was; saw Gilman the second time with a gun. When Bishop was killed I was still in the warehouse; saw Gilman with a gun both before and after the firing commenced, but he did not fire. I think it was Gilman who asked, "who fired?" and the question was asked in a remonstrating tone; do not know who fired of those who were in the warehouse. The stones came through the windows and near me. The people inside could have sheltered themselves from the stones behind the walls of the house. The firing was from that end of the warehouse next the Penitentiary, and understood that the person who was shot was shot in that direction. Before firing there was some conversation about the manner of doing it. I said that if it was found necessary to fire at all, it would be best at first to fire over the heads of the crowd. Mr. Lovejoy replied, that "they must not waste a fire." Mr. Gilman addressed the people who had collected outside. People inside among themselves seemed firm, cool and collected. Gilman remarked that he thought he had a right to defend his property, and he should do so at all hazards or at all risks; attempted to prevent Gilman from firing; he was then in the garret at the door or near to it. Gilman told me I should get hurt if I stayed at the door, and advised me to move away. My opinion was that the press had better be given up, and I so advised Gilman. Gilman said they would not give it up; said he did not believe the mob would go to such extremes when I told him

that they would burn or blow up the building in order to get the press; he seemed anxious nothing of the kind should be done. When I came out of the warehouse Bishop had been killed, and the mob then had guns. The mob first approached the warehouse on Water street; there were from fifteen to twenty people in the warehouse, though I don't know with certainty how many there were. All were not armed. Mr. Noble had no gun, and he remarked that he would not shoot. When Gilman was at the window intending to fire, the stones were flying through the room. It was prior to Bishop's death. The members of the firm are Benjamin Godfrey and Winthrop S. Gilman.

*Cross-examined.* There was danger to those inside from the rocks flying into and through the rooms unless they were protected behind the walls. The glass was all broken from the windows, the sash also. There was no opening in the building except the skylight, that I know of, other than what was on the ends fronting the river, and Penitentiary. Some whom I had seen in the street threatening to blow up or fire the house were those who composed the crowd attacking the building. There was a discharge from some weapon on the outside before there was any firing by those within the building. I think the weapon discharged was a pistol, and that it was fired when the crowd were passing from Water street round the building; was present at the time of the Mayor's address. Where the shot which reached us at that time were fired from don't know. Mr. Gilman, previous to any firing



from any one addressed the mob, and requested them to retire and desist from their purpose. After the Mayor had concluded his address to the mob, the firing was renewed by those on the outside and within the warehouse; had two different interviews with Gilman. Those inside the warehouse avowed their intention of defending the press solely, and disclaimed any other object; said they would not be the first to commence an attack. Mr. Gilman remarked, that he should be sorry that any blood should be shed, but that they would defend the building at all hazards, if need were with their lives.

*Sherman W. Robbins.* Knew nothing of the riot till after Bishop was killed. I went with the Mayor and Mr. West to the warehouse and we were admitted. Most of the individuals whom I saw in the building had firearms; saw Mr. Gilman there; he had a gun in his hands; he said but little in my hearing. The Mayor, Deacon Long and Mr. Gilman, stepped aside and had some conversation. Our object in going in was to communicate the request that those outside had made of us.

*Cross-examined.* I told those inside that the persons outside said, "that if the press was not given up, the building would be burned or blown up."

*Samuel Avis.* Was not out till after the fire had been put out, Bishop had been killed and the firing was over. I went inside the warehouse, saw no one there whom I thought had been in the

building during the riot except Mr. Weller. I saw the body of Mr. Lovejoy; saw firearms. I saw only one gun, however, I think, and that was in the counting room. I remained but a few moments. I saw no ammunition, no preparation for, nor indication of war.

*Anson B. Platt* (a young lad.) Know there were some guns fixed at our establishment. I run some bullets by the orders of Mr. Tanner. By our establishment, I mean Mr. Roff's establishment; saw some guns standing in the room but did not count them to know how many there were; don't know when they were taken away nor where they were carried to. I saw them there before the mob took place. The guns were standing there when they were taken to be carried to the church. They were returned to the store after the night of the "church affair."<sup>11</sup> Henry and William Tanner, both of them asked me to run the balls. Mr. Gilman didn't ever ask me. Tanner did not tell me what they were going to do with the balls; was at the store at the time of the riot; did not go to Mr. Gilman's store till business was over. Mr. Roff is a merchant and he keeps guns to sell. I saw only one old gun and that was a fowling-piece. I know the guns were gone. They were missing before Lovejoy was shot, how long before that I don't know. I don't know how many guns there were in the store. I should think there were a dozen in all and all of them were gone. The

<sup>11</sup> A meeting to discuss slavery, held in the Presbyterian church, Upper Alton, Oct. 26, 1837. See *Memoir of E. P. Lovejoy, ante*, p. 532.

balls I run were made to fit the guns, I expect, but don't know. The guns were put up there after they were brought back from the church. They were the same guns that Mr. Roff had previously in the store for sale.

*John H. Watson.* Know nothing at all about Mr. Gilman. I did not see him at all that night. I was not at the warehouse till all was over. I know of no previous preparations; went to the warehouse but could not get in; tried to get in after I heard Lovejoy was killed, but could not get in; was in Mr. Keating's office when the crowd first passed by the office towards the warehouse. They had no firearms among them that I saw. They picked up some stones as they passed the office and proceeded towards the building. The mob threw stones at the warehouse for some few moments. About the third gun Mr. Keating sprang to his office window, and remarked he thought it was fired by those inside the building; then found out that Bishop was killed.

*Joseph Greeley.* Went to my boarding house evening of 7th November at the usual tea hour. At the table was told that an Independent Militia company was to be formed that evening under the laws of the State; was told that those favorable to the formation of such a company were to meet at Godfrey & Gilman's store that evening, and was urged to attend; declined going on the ground that it might be an abolition meeting, but was assured that it was not; went down to the warehouse with another person; was requested to sign a paper which was a set of by-rules, as I understood, and I did so.

The number of people which the law requires having signed, we elected officers and made Mr. W. G. Atwood Captain; then went into the second story where we found some arms. We took them and paraded and drilled for a little time, but as the guns were loaded we did not exercise much. This was between seven and eight. About eight the inquiry was made, "Who would stay and defend the building that night?" Some stepped forward and volunteered; was asked to stay, but declined and went home. I knew nothing else till the bells rung. I then got up and went down to the spot. There were about thirty or forty guns in the warehouse. The guns were said to be loaded. Mr. Gilman was present at the time we were drilling, but was not active; he was one of the company which was formed; some appeared to think that they would have a good time if they stayed in the building. They expected to have some crackers and cheese and hear good stories. It was understood a press was in the building, and I suppose those who volunteered to defend it expected an attack; was present at its destruction—saw it knocked in pieces. The behavior of the mob engaged at the work was orderly—it was done in a quiet sort of way. They seemed to be happy while engaged in breaking it in pieces. Soon after the press was broken up I went home.

*Cross-examined.* Heard nothing said about any design of attacking the building previous to the attack. The streets were deserted at the time I went home from the warehouse. Mr. Walworth (one of the defendants)

asked me to go up to the warehouse and join the company. I do not recollect seeing Mr. Murdock (City Solicitor) there; understood the defense of the press to be an entirely distinct affair.

I joined the company understanding it was formed for the defense of the city; cannot tell how many people were in the warehouse at the time I was there.

#### THE WITNESSES FOR THE DEFENSE.

*William L. Chappell.* (Sworn.)

*Mr. Cowles.* On the night of the 7th November last past, previous to any attack by the mob upon the warehouse, did you go

with Winthrop S. Gilman to the Mayor? If so, state what passed at the interview between the parties.

*Mr. Linder.* I object to any answer being made to the question by the witness. I anticipate the object aimed at by the counsel, your Honor; and I may as well state my objection here now and in full, to any answer which may come from the witness. For what is this witness introduced? Why is he brought here? Sir, it is to show, by hearsay, that the defendant now upon trial had a conversation with the Mayor, and also the nature of that conversation; it is to show that the defendant acted under an authority, which this witness is to swear he received from the Mayor; it is to show, so far as the declarations of this witness go, that the acts done by this defendant, on the night of the 7th, were legalized beforehand by the Mayor. Now suppose this witness should swear that the Mayor authorized the defendant to arm himself and his friends, and assemble for the protection of that warehouse; suppose he should swear that the Mayor gave him permission to act as he did; what then; why sir, we say that the Mayor had no right, had no business, had no power to give such authority. Sir, he had no such power. Where does he derive his power? The Mayor is invested with certain authority under the act which incorporates the City of Alton, under the by-laws—under the rules and regulations which the City Council have ordained. But, sir, in the act of incorporation such power is nowhere given to the officer—you can't find it there—you can't find it in the City Charter—you can't find it in the ordinances of your City Council. We contend that he did not have such power as a peace officer, for the laws have not given to peace officers such authority. Then we say that such power as would enable the Mayor to grant Winthrop S. Gilman the authority contended for is not vested in that officer by the City Charter, nor by the By-Laws of the Council. The Mayor is only a peace officer, having certain delegated powers in criminal cases, which are entrusted to all peace officers. But, sir, suppose such authority was given—suppose the Mayor had a right to give such authority, I then object that this witness cannot be called to testify to it. If he should be permitted to do so it would be hearsay evidence. The Mayor is in court—he knows what authority he gave. Let them ask him. They are bound to produce the best evidence, and

they cannot be permitted to give evidence of the Mayor's declarations, when he himself is in court, ready, if called upon, to testify. A party is bound to produce the best evidence.

*Mr. Cowles.* The Mayor is, *ex-officio*, a Justice of the Peace. The Government, in the long speech just submitted to the Court, has assumed that the Mayor had no power, had no right to grant Winthrop S. Gilman the authority which we propose to show he did grant to him. There is some difference between assumption and proof. But may it not be shown that the defendant had no criminal intent in doing the acts, in the commission of this offense, if the Government will persist that it was an offense, by proving that he asked the advice of the Mayor—that he anxiously sought his direction, by proving that he was careful to do nothing until he had first consulted that officer. Suppose, sir, we show that Mr. Gilman, on that evening, consulted the Mayor of this city; and that at the close he went away actually having or honestly supposing he had, full and complete authority from the Mayor? what then will be the consequence? what will be the effect upon this jury? what becomes of this indictment? how will you make out a crime? where then is the criminal intention, a necessary ingredient in crime? But take the question upon consideration of power, of authority in the Mayor. The criminal code of this State has the following provisions: "If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable, or other public officer, such persons so offending," etc.,

Again, "Every male person above eighteen years of age who shall, by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, justice of the peace, or other officer concerned in the administration of justice, shall, upon conviction," etc.—§ 137.

Now, sir, your Mayor is, *ex-officio*, a justice of the peace, and by your laws "all officers concerned in the administration of justice" are conservators of the peace, having full power to take such measures as they may deem expedient for the prevention of offenses, as well as the punishment of offenders.

Well, here was a plan premeditated, openly and boldly promulgated, avowed with such boldness as that it reached the ears of your very peace officers, to destroy the press; and if it was necessary to the accomplishment of that purpose, they proclaimed their intention of burning or blowing up the warehouse. Will the Attorney General say that a peace officer could make no provision to prevent the commission of such a crime? Will he hazard the assertion, that our laws compel one who is a conservator of the peace, to stand by, and folding up his arms, await with such patience as he could, the arrival of the period when he might interfere, not for the prevention of the offense, but for the detection and arrest of the offenders? Sir, prevention is better than cure, and our laws guard as well against the commission of crime, as provide for the punishment of offenders.

But your Mayor, *ex-officio*, is a justice of the peace, and as such, had authority to take such steps as would prevent the commission of the offense which was threatened.

But the ground upon which we contend we have right to the testimony of this witness is, that he goes to show the absence of all criminal intention on the part of this defendant.

The Government urge, secondly, as ground of objection to the admissibility of this evidence, that it is in the nature of hearsay. But may not the declarations of an officer of the law be given in evidence? may not the official declarations of an official person be admitted? We wish, however, only to show by this witness, the absence of all criminal intention on the part of the defendant, and for that purpose offer to prove, that he went with the defendant to the Mayor, and that in the conversation that was held Mr. Gilman had, or supposed he had received the authority of the Mayor to pursue the course which was taken.

*Mr. Bailey.* The witness is offered to prove the declarations of a third party. The fact that Mr. Gilman had, or supposed he had authority from the Mayor, is proposed to be proved by hearsay. Such evidence is inadmissible. The person, whose declarations are sought to be proved, is present in Court. He can best tell what authority he gave. The course proposed by the counsel is most extraordinary.

*The COURT.* It is unnecessary for the Court to give an opinion upon one branch of the subject argued. The question whether the Mayor had the authority contended for by the one and denied by the other side is not necessarily involved in the decision of the question presented to the Court. The only question to decide, is, as to the admissibility of the evidence proposed to be introduced. The declarations sought to be proved are inadmissible. They are in the nature of hearsay evidence. Any evidence of the declarations of a third person as a general rule would be inadmissible, and especially when the person whose declarations you seek to prove may himself be sworn to testify. It makes no difference whether such person speaks officially, or as a private individual. The evidence cannot be received.

*Mr. Cowles.* I offer the witness to prove a fact. I wish to prove that Mr. Gilman, in company with the witness, went to the Mayor for the purpose of getting his permission, his authority, to enter and defend the building. I do not offer the witness to prove what the declarations of the Mayor were.

*The COURT.* The objection is sustained by the Court.

*F. B. Murdock.* These are the of this city. I am the Clerk of records of the Common Council the Council.

*Mr. Cowles.* I propose to read to the jury an extract from this book. It is part of the record of the doings of the Common Council on the 6th day of November last, the day preceding the commission of the act for which my client is now arraigned as a criminal. I offer it as proof of the fact, that the Mayor on that day applied to

the City Council, at the instigation of Mr. Gilman, to appoint an additional police.

*Mr. Linder.* We make the same objections to the introduction of this book in evidence, that we have previously made to the admission of the testimony of the witness, Chappell. They propose to prove by this book, what? Why, that the Mayor stated to the Common Council, that Mr. Gilman had stated to him, he apprehended danger to his property, and desired that a body of special constables should be appointed. Our objection to the testimony sought to be derived from the witness, was, that it would be in the nature of hearsay evidence. The Court so decided, and ruled it to be inadmissible. We now object to the introduction of this book, because it goes to the jury as the hearsay of a hearsay. This case is like that which might arise in legislative proceedings. I had the honor, sir, of once introducing to the assembly of this State, for its consideration, some famous resolutions, in regard to the bank; and would your Honor hold, that I could prove the contents of those resolutions by the minutes of the doings of that body? Could the proceedings of that time be proved by the Journal of the House of Assembly? The evidence offered here, is the record of a representation, made on the 6th of November to the Common Council by the Mayor; of an application made to him by Winthrop S. Gilman, in relation to an apprehended attack upon his property. Is it made competent evidence because it happens to be enrolled upon parchment, and included in doings of the Council Board?

*Mr. Cowles.* The defendant is indicted for doing a lawful act in an unlawful manner. He is charged with resisting with force and arms, in a violent and tumultuous manner, an attempt to break open his warehouse. Our object is, to show that the attack upon the building was not only premeditated, but that the Mayor was apprised of such premeditated attack beforehand—that Mr. Gilman communicated to him his fears, his anxieties in regard to the matter, and that by reason of the communication made to him by Mr. Gilman, the Mayor acted, and applied to the City Council to appoint a body of special constables. If we can show the fact, we shall ask the jury to draw certain inferences.

Sir, it is the business of your Mayor to preserve the peace of the city—it is his duty. He has the power, upon him rests the responsibility. His acts are public acts and when he, for the purpose of preserving the peace of the city, makes application to a co-ordinate branch of the city government, and that body act upon such application, it then becomes a public act, entitled to credit, entitled to be received as evidence in a court of law. We want to show the fact that the conservators of the peace of the city, the guardians of its welfare, those invested with power, those clothed with authority—who were bound to suppress tumult and riot—who were bound to preserve order and peace, whose duty it was to stretch the strong arm of the law over the humble and peaceful citizen, knew of the danger Gilman apprehended to his property. And if we can prove



this knowledge; if we can bring it home to them, and also prove how, and for what purpose it was communicated to them, and prove it too by the record of their own proceedings, drawn up, and written out by their own officer, we ask the privilege, as we claim the right. The acts of the Common Council of this city are public acts—their record of those acts is a public record—and it not only is evidence, but it is the best evidence that can be produced.

*Mr. Bailey.* The object for which this book is offered in evidence is to show the intention of the defendant; to prove to the Court, that he had no criminal design, and to clothe such evidence with peculiar sanctity, by deriving it from a public record. But although this evidence might avail other defendants upon another trial, it will not be deemed relevant in this. Mr. Gilman is now alone upon trial, his name is not mentioned in the record, and the book cannot therefore be admitted in evidence. If admitted, it would only prove that the Mayor received the information which he communicated to the City Council in relation to the apprehended attack, from some citizens, and would be no proof that the defendant was the one from whom he received the information.

The COURT. What is the issue made in this cause? On the part of the people, that there was an unlawful assemblage on the night of the 7th of November last. On the part of the defendant, that certain facts exist which warranted that assemblage; that in the commission of the acts charged to be criminal, the defendants were justified, they having acted under the authority of the Mayor. There can be no question that if they acted under such authority, they may justify their acts. The Mayor and Common Council are the guardians of the city—they are intrusted with certain powers, among which they have the authority necessary to preserve the peace of the city—if they have reason to fear the tranquility of the community to be in danger—no matter from what cause—they are bound at all hazards, and at all times, to provide means to protect the persons and property of the citizens commensurate to the apprehended danger. By virtue of his office the Mayor may call out the militia and other citizens to suppress tumult and riot—all are subject to his authority—all are bound by any order he may issue on such an occasion, and the citizen who should refuse to obey, would be liable to the penalty of the law.

The defendant, for the purpose of showing the intention which actuated him in the premises, offers the records of the Common Council in evidence, to show that he communicated the danger which he apprehended to his property, to the Mayor of the city, and requested the appointment of special constables to prevent the anticipated destruction of property, and disturbance of the peace of the city. But it is objected, that the admission of the book would be permitting evidence to go to the jury, which, on account of its character, is inadmissible. The book contains the proceedings of the Common Council. It is the record of their official acts, and, by the charter creating the city, a certified copy of their proceedings is



admissible as evidence in every court of this State; therefore the record itself must be admissible. The Court can perceive no objection to the admission of the book in evidence.

*Mr. Murdock.* As requested I will read from the record of the doings of the Board at its sitting on the 6th of November: "The Mayor informed the Council that individual citizens had represented to him that they believed themselves to be insecure in their persons and property, and that he, the Mayor, from the facts in his knowledge, and from the faith reposed in the representations made him, had much reason to believe that the peace of the city would be disturbed:

and he submitted to the Council the propriety of authorizing him to appoint special constables to aid in the maintenance of order."

"Mr. King moved the following resolution:

"That the Mayor and Common Council address a note to Mr. Lovejoy and his friends, requesting them to relinquish the idea of establishing an abolition press at this time, in the city, and setting forth the expediency of the course.

"Not acted on."

*John M. Krum.*<sup>12</sup> Am Mayor of Alton. With the permission and indulgence of the Court, I should be glad to avail myself of this opportunity to make a few remarks before I proceed with my testimony. I profess to know the prerogatives of the Court and jury, and the province of a witness. It is my desire to keep within the province of a witness. There are circumstances, however, attending this case so peculiar in their nature and tendency, that I feel it due to myself, due to my official station, and due to the defendants and the public, that I should ask from the Court, from counsel and the jury, in giving my testimony, a somewhat wider range than is usually allowed witnesses in ordinary cases.

I am not insensible of the conspicuous position which I occupy as a witness in this instance; nor am I destitute of the feelings and sensibilities that are natural to mankind. But from the relation I bear to the citizens of Alton—from the official station I occupy—and when the peculiar attitude in which I have been placed, from the force of circumstances, in reference to the unfortunate transactions which have led me to this prosecution, are considered, I trust the Court, the jury, the accused and counsel will pardon me for asking the indulgence.

<sup>12</sup> KRUM, JOHN MARSHALL. Born New York. Educated Union College and became member of Bar of New York. Moved to Alton in 1832 and was its first Mayor. Removed to St. Louis in 1842, where he became a leader of the Bar of that city. Judge Circuit Court 1842; Mayor of St. Louis 1848, and many years a member of the School Board; Member Democratic Conventions of 1842, 1852, 1856 and 1860. With the Civil War he became a member of the Republican party and one of the leading Unionists of St. Louis. Was the father of Chester H. Krum, ex-Judge and prominent criminal lawyer of that city. Died in St. Louis.

It will not, I trust, be considered strange that I should manifest some sensibility, when called to testify in a case attended with such unusual excitement: it will not be considered strange, that I should manifest some feeling and timidity, while the attention of this large and anxious assembly—of this community, and the public, is directed to myself, and to the evidence I shall give before the Court and jury. And when it is considered how strangely, how wickedly and meanly, the recent melancholy excitements in this city, and my own conduct and motives have been misrepresented, impugned and calumniated before the public, it will not be thought out of place, that I should ask of the Court, of counsel and the public, the most careful and scrutinizing attention to my evidence.

I have hitherto borne the injuries done to my feelings, and the imputations against my character, in silence and with regret. I have deeply regretted that the public and the press should give birth and circulation to reports, which have been without foundation—false and libelous in their character.

Doubtless many have aided the circulation of such reports, very innocently, and with no bad or criminal intention. I most cheerfully forgive all who have been in any way instrumental in this, when they were ignorant of the situation in which our citizens were placed.

Those who have given origin to false statements and misrepresentations, connected with the recent affairs to which I now allude, whether in reference to myself or to others, are guilty of the most heartless, reckless and degrading meanness, and well deserve individual and public execration. I profess to know and appreciate the responsibilities and duties that rest upon me as a man and a citizen; I trust I feel and appreciate the responsibilities of my official station, and my duties to my fellow citizens.

Nor have I been insensible of the peculiar and trying situations in which I have recently been called, in discharge of my official duty. Few men, in so brief a period, have been placed in more trying or critical situations. During the whole of the unhappy excitements that have heretofore prevailed to such an alarming extent in this city, I endeavored to act with firmness, prudence and with moderation.

It was my firm conviction that the exigency of the times required at my hands the course of conduct, official as well as private, that I did pursue. It was my earnest desire to heal the unhappy dissensions and avert the fatal and disastrous calamities with which we were threatened—my time, labors and influence, have been cheerfully and zealously devoted to accomplish an object so desirable.

I leave my fellow citizens and the public to judge of the propriety and correctness of my motives and conduct. Notwithstanding the calumnies that have been heaped upon me and my official conduct—although my motives have been assailed in a manner that might well arouse my feelings, I am grateful, and feel proudly elevated in my own estimation, that I can stand before my fellow citizens, fully conscious of the rectitude of my conduct and my motives.

I have the consoling reflection, that I have at all times endeavored to discharge my duty as an officer and a citizen with unflinching firmness, to the best of my judgment and abilities. I am grateful that I have been called upon to give evidence, before this Court and jury, under the fearful solemnity and unction of an oath, of matters that have so long been the theme of abuse and defamation, and I hope the result of this investigation will save in future, the feelings of sensibility from defamation and outrage, and serve to disabuse the public mind. I am ready for examination as a witness.

The COURT. Mr. Mayor, please give the jury a narrative of the facts from the organization of our city government to the time of the riot, so far as they were connected with the defendants on trial.

*Mayor Krum.* On the 30th day of October as I was going to dinner, Mr. Alexander informed me that Dr. Beecher was to preach that night at the Presbyterian Church. He asked me if I would not attend. I replied that I did not know—I would see. I had an appointment, which would occupy a part of the afternoon and might extend into the evening. In the afternoon, Mr. Gilman came into my office; he told me that they expected another press would arrive in a few days; that they had organized themselves into a company, and that they would be ready, in case any violence should be offered, or any disturbance take place, to act in obedience to any civil authority; he asked me to go with him into Mr. Roff's store. I went with him and found there, Messrs. Roff, Walworth Breath, one or both the Mr. Lovejoys, I think both, certainly Rev. E. P. Lovejoy, and I presume others. They stated to me that they expected the press would arrive soon; that it was consigned to A. B. Roff, and that they expected it would be landed at Mr. Roff's store. Some one remarked that Col. Buckmaster had told them he would not have it in his store, on account of the insur-

ance. They said they had prepared themselves with guns, in case of there being any trouble, and said they expected the press would be assaulted; told them if the press was landed in the day time, I should apprehend no danger, and could not believe that an attack would be made under such circumstances. They replied to me that in case any disturbance should take place, they would hold themselves ready to obey my orders. I thanked them for their offer, said it was all well and left. Saw guns in the store at this time. Some one (I think Mr. H. Tanner) proposed the plan of taking the guns to Mr. Gilman's warehouse and asked me what I thought of it. I urged upon the propriety, the absolute necessity of acting with moderation and prudence, and said it seemed to me that nothing would tend more to increase the excitement then existing upon the subject than for them to appear in the street with arms; did not consider that I was there, at that time, in my official capacity as Mayor. They again repeated to me their readiness to act and obey any orders they might receive from the civil authorities. I thanked them for their readiness to do so, and

begged of them, if they should deem it necessary to take the guns to Mr. Gilman's store, they would take them there in such manner as to avoid exciting any suspicion, and suggested the plan of carrying them there in a box. In the meantime a boat arrived and Mr. Gilman and myself went on board of her to ascertain whether the press was on board or not; ascertained that the press was not there, and we left. When I got to Roff's store saw J. S. Clark and Mr. Gilman engaged apparently in conversation. Mr. Gilman asked me if I should attend the church that evening. I replied that I had not intended to. He urged me to go; said he apprehended there might be some difficulty, and in such case my presense might be desirable. I said if my presense was necessary I would go. The conversation then turned upon the arms which were in the store, and he (Mr. Gilman) asked me what I thought of having the arms in readiness, near the church, in case any disturbance should take place. I told him I did not apprehend there would be any necessity for having them there. Mr. Gilman replied, he hoped that no disturbance would take place, but that he feared there was more danger than was imagined. I then told him that I did not know but it would be well enough to have the arms in some convenient place here, (meaning at Roff's store) in case they should be wanted. At the proper time I went to the church. Found there a large congregation assembled. All was quiet and peaceable. During the services, and towards the close, a stone was thrown through the

west window of the church, but did no injury. The congregation rose immediately to their feet and some one, I think from the gallery, cried out, "To arms;" afterward was informed that this was Mr. H. Tanner. There was a rush towards the doors, but Mr. Beecher asked the audience for their attention again; order was soon restored, and the services proceeded to their close without further interruption. The congregation was soon dismissed: with the others I went out. The people were crowded together around the doors and Mr. Mansfield, and some others, stood there with their arms. There was quite a crowd around the doors in front of the church halloing, and calling those who had guns cowards. Got the attention of the crowd and commanded them, one and all, immediately to depart, and repair to their respective homes. The first intimation I had that the arms had been carried to the church, was by observing them in the hands of those who stood at the doors. The crowd, soon after I made the proclamation, dispersed, and, in company with others, I started and came down the street. At the bridge there was quite a collection of people and I took a gun away from a man by the name of John Adams who stood there. Subsequently to this, I was frequently called upon by Mr. Lovejoy (now deceased,) Mr. Tanner, Roff and others, and my opinion asked in regard to the propriety and expediency of organizing an armed force. I remarked that at present there was no organized militia force in the city, and no force upon which I could depend in case of emergency. They stated

that they thought of forming a military company, and asked me if, in case they did, I would head it. I told them I could not, that my official situation was such as would render it impossible. Mr. Lovejoy, in particular, called repeatedly upon me, and said that I ought to command a military force. I told him I could not consent to do so; that I never should do so unless it became necessary for the protection of the laws. We had repeated conversations upon this subject. I repeatedly, and I believe always, told Mr. Lovejoy that it was within the province of any citizens to organize such force, if they deemed it necessary, that they could do it, if they pleased at any time. Mr. Lovejoy stated that they wished to organize their company under my sanction in an official capacity, and asked me if I would give such sanction. I told him that I could not, and explained to him the reason why I should feel bound to withhold it. I told him what the provisions of the law in regard to the formation of such companies were; explained to him the mode of proceeding necessary to be followed in the organization of their company. Subsequently to this I loaned my law books to some one, who, I understood, was to join the company. Mr. Gilman shortly after, told me that they had organized a company, and had put themselves under the command of William Harned. He tendered me the services of the company, and said that they would at all times hold themselves in readiness to obey any commands I might issue; I thanked him for his readiness to act and told him

that whenever the time should come in which I should think the occasion would warrant me to call for their services, I should unhesitatingly do it. On the night of the 6th, the morning of the 7th of November last, at about 3 o'clock, Mr. Gilman and Mr. Roff came to my room. They stated that the press was coming, that the boat was in sight coming up the river, and that Mr. Moore was upon the boat and had charge of the press; that arrangements had been made to have it safely landed and stored that night, and they requested me to go down and be present at its landing, so that in case of difficulty or disturbance I might be there to suppress it. I got up, dressed as quickly as I could and went down to the river. I stood at Mr. Gilman's warehouse while the boat was nearing and till she landed. The hands of the boat put the press on shore and removed it into the warehouse. After the press was stored I went up to the warehouse; found some twenty or thirty people assembled, all armed; they again offered me their services in aid of the laws. I told them that I did not see any occasion for their services, but that if occasion should arise when their services should be needed by me, I should not only call for, but should expect to receive their assistance. On the 6th Mr. Gilman called upon me at my office—he introduced the subject of the rights of citizens to defend their property. We had a long conversation; I gave him my opinion upon the subject; think I read the law, and explained to him its principles; I do not know whether he asked my advice as Mayor, as lawyer,

or as a friend and citizen. I did not consider that I was then advising him as Mayor—in the course of our conversation we spoke of our municipal regulations; I told him I thought they were exceedingly deficient, and I believe I mentioned in what particulars. He asked me if I would appoint special constables; said he apprehended danger to his property; I told him that I had no authority to make any such appointment, that I would cheerfully do all I could; that the Council would meet that day and that at their meeting I would lay the whole matter before them. When the Council met I did make the application, but I did not recommend in terms the appointment of such officers; I left the whole matter to the action of the Board. I was absent at the next meeting of the Council when the records were read, or I should have noticed the mistake in the record, and had it corrected. On the evening of 7th November last, Mr. Gilman and Mr. Chappell called at my office. They told me they apprehended an attack would be made upon the warehouse, as they had understood the mob were determined to destroy the press; that a number of armed men had assembled and were then in the building for the purpose of defending it, and that they had come to the resolution of remaining there, and defending it at all hazards; they asked me what I thought of their determination; they spoke of the rumors they had heard in regard to the determination of the mob to destroy the press. At that time all was quiet in the city, so far as I know, and I had but a lit-

tle while before been in the streets, and observed nothing which led me to suppose an attack was meditated; had exerted myself that day as much as I was able to get all the information which was possible. People seemed to shun me, and were very reluctant to communicate with me at all; could succeed in getting no information which should have induced me to believe any design to destroy the press was meditated. Mr. Gilman asked me what I thought of the armed men who were in the building, remaining there for the purpose of defending their property. I told him they had an undoubted right to be there—that they might rightfully remain there, and that they would be justified in defending their property; I did not understand them as making this application for advice to me, as Mayor. Mr. Gilman said that they were well prepared with arms; that they should remain there during the night; that they were fully determined to defend the press and the building; and that if the attack which they apprehended was made, they wished it to be understood that their services would be ready to execute any order they might receive from any civil officer. I replied that if the emergency should require the aid of armed men, I should not hesitate a moment in commanding the men who were assembled there to suppress the riot, but that I should be the sole judge of such an emergency. I never ordered any man to repair to the warehouse; but in every instance, I was informed that they had already repaired there. Mr. Gilman repeatedly told me, that all he de-



sired was to act under the authority of law, and the civil officers. After Mr. Gilman left, I remained in my office till between nine and ten o'clock; stepped into Dr. Hart's office, and while there heard a number of people passing by; immediately came down stairs; recognized two of the crowd; one of them had a gun; came down to Mr. Robbins' office, sent for Judge Martin and other civil officers, and waited some time for them to come. Mr. Robbins and myself finally started together. As I was going down the stairs I heard two reports of firearms; from the sound I thought they were pistols; the reports seemed to be below; soon heard another which I took to be a gun. I hastened up, and soon saw people carrying a man—it was Bishop. I stepped up to them and asked if any one was hurt; they replied yes, one of our men was shot; asked if he was much hurt; they said they thought not. They seemed very much excited. A crowd gathered round me; I addressed them, and used all the means in my power to induce them to disperse. I asked them what they intended to do. They said they were determined to have the press. Some one proposed that I should let those inside the warehouse know that they wanted the press—that they would have it at all events, and said they would retire while I went in and communicated their determination. I acceded, supposing that if we could once get them scattered, the excitement would subside and we could then control them. They retired; I went to the warehouse; Mr. Gilman opened the door and let me

(with Mr. Robbins and I believe Mr. West also) in. He, (Mr. Gilman asked me how many outside were injured, if any. I told him there was but one injured, so far as I knew, that there were but few outside; then told Mr. Gilman what the mob said they wanted, and the determination they had expressed; also stated my impression, that when I went out we could control them. I stayed in the warehouse some time purposely in order that the excitement should subside, as I had no doubt it would. While in the warehouse I went up on to the second floor. I saw there Gilman, Lovejoy, Walworth, Long, Hurlbut, and some others; saw some arms about the walls. Gilman, Long and Lovejoy had guns in their hands. Gilman told me that two or three guns had been fired from the house. Deacon Long asked me if they were justified. I replied, must certainly; I thought they were. My impression was that we should be able to quell any further disturbance, when we went out; and so expressed myself. I had no idea any further attack would be made.

To *Mr. Gilman*. On the night of the 6th I said to you that you had better not leave the warehouse, not even to go to your meals without someone being there to guard the press; you appeared anxious that whatever was done, should be done under the sanction of the civil authority; told you that if there was any danger that the people should attack the press, I should order them to desist, and should warn them of the serious consequences which would follow any attempt on



their part to disturb or destroy the press. If the press was attacked I should first order the mob to desist, and that if they persisted I should then order you to fire.

*Mayor Krum.* I agreed in one of the interviews I had with Mr. Gilman to appoint Captain Harned as special constable, but afterwards, upon an examination, I found I had no authority to make such appointment; did not consider the armed force at the church, or at the landing of the press as organized under my authority; have lived in the city for nearly five years. Godfrey & Gilman built the warehouse which was attacked; it has been in their possession ever since I have known the place; know Mr. Gilman to be an orderly citizen; gave no orders while I was in the building either to Gilman or any one else restraining them from firing, or doing anything else; thought they had a right to do as they were doing. When I went out, I commanded the people assembled there to disperse. If I had seen anything riotous on the part of those in the warehouse I should have ordered them to desist; should have commanded them to disperse. When I first went up, the front of the store had been broken in. Some shot struck my hat while I was addressing the crowd. The guns were fired on the outside of the building, and, I thought, from the southeast corner of the warehouse; there were three guns fired at the people who were raising the ladder to the warehouse; supposed the shot which reached me were fired at them; and I afterwards ascertained that I stood about in the direction.

The two first discharges were from the outside, and they were the first which were fired, I think.

To *Mr. Davis.* From all the circumstances, I am induced to believe that Mr. Gilman supposed he was acting under my authority. While I was in the storehouse, some conversation took place about the right which a man had to defend his property. I uniformly told them, that they had a right to be there; told them they were justified in defending their property; but I told them so as a lawyer. While I was in the warehouse, I told them, that if they were out of doors, I should command their aid in suppressing the riot; but that I could not command them while they remained there.

To *Mr. Linder.* While I was in the building, I gave no directions to those inside as to the mode of resistance they should adopt; considered that they acted upon their own responsibility; but gave them my legal opinion. I took the message which the mob requested me to take, and communicated it to those inside; told them that the mob swore they would have the press at all hazards. Gilman replied that they had resolved to defend the press at the risk of their lives, that they could not give it up; saw Gilman, Lovejoy, Hurlbut and Long and I recollect of no others now whom I saw with guns. In my remarks to the mob, spoke to them of the dangers they were in, the laws they were violating and the penalties they were incurring by the breach of law. Gilman once told me that it was not determined whether the press should be established here, or at

some other place; don't know that I ever heard Gilman say anything about keeping Mr. Lovejoy here or persuading him to go off. Did not state to Mr. Gilman that he could not resort to violence, unless under the direction of an officer of the law; told him that every man had a right to defend his person, and property, and to use violence if it was necessary; and that each man must judge of his extremity. I repeatedly stated to him that whenever a case presented itself, where I thought the emergency required it, I should not hesitate to call upon those men, or any other, to aid me in maintaining order; but I thought it must be an extreme case which would justify such a course; advised Mr. Gilman, in case of any disturbance, to address the crowd in the first place; thought he took a correct view of the matter; told him what course I should probably take if I was placed in a similar situation; but in all instances I advised him as a friend and a citizen, and not as an officer. At the time I addressed the crowd, after I came out of the warehouse, stated to them that unless they dispersed they would be fired upon by those in the building; the mob made no reply. They advised me to get out of the way and go home.

*Samuel J. Thompson.* Was in the warehouse on the night of 7th November. Before the mob assembled Mr. Gilman spoke of sending for the Mayor. The mob assembled before the matter was arranged and he was not sent for.

*Cross-examined.* Was one of those inside the warehouse on that night; was there all the time; do not know who shot first; was stationed towards the river, and the stones rattled so that it was difficult for me to tell whether a gun was fired or not. The first gun I heard, was fired from the outside. There were three or four guns fired before the cry was heard that Bishop was dead; never saw Bishop; said they were sorry to shoot any one, and that they hoped this would put an end to the attack. Some of the guns were loaded with fine, and some with buck-shot; had a gun but did not fire it. We had resolved to defend the press at the risk of our lives. The thought never entered our minds that the mob was as bad as it turned out to be; and therefore we did not prepare as we ought to have done; should myself act differently again; remained in the warehouse till the mob left it; supposed I acted under the authority of the Mayor. When the Mayor came into the building he was asked if we had done right in firing, he replied, Yes, perfectly. The Mayor and Mr. Robbins both said that the mob were determined to go headlong and get the press at any rate. The Mayor was asked to remain. He said, No; I can do more good on the outside, or I would. The understanding we had among ourselves was not to fire until we were fired upon. We did not fire until we were attacked, and guns were fired.

*Mr. Linder.* I now move, your Honor, to reject this evidence. This witness, by his own showing, is equally guilty with those indicted. He is *particeps criminis*; and one standing in such situation

can never testify in favor of his fellow criminals—cannot be permitted to give evidence, where such evidence goes directly to exculpate those with whom he was associated in the commission of an offense—shall not be permitted to swear away the guilt of his co-actors in crime.

*Mr. Cowles.* This seems to me a strange course to pursue, and a singular time to adopt it. The evidence has gone to the jury; it has had its effect; it has produced its impression, and if the evidence could be withdrawn from them, what course will the Attorney General point out, by which its effect can be withdrawn, or its influence removed? And it is too late to take the objection now. If it was to be made at all, it should have been made long ago. But the government has sat still and permitted it to go to the jury, and because the witness has disclosed some rather unpalatable facts, they now start up with this wild proposition. We had a right to presume that the evidence was given in, not much to the satisfaction, I acknowledge, but surely with the full consent of the Government. The presumption of law is, that if a party sits by, hears evidence improper in its character given to a jury, and does not object, that he has no objection; or having any waives it. It is a fair presumption that it was given in by his consent, if he do not make his objection at a proper time. It is so decided by the Supreme Court in the case of *Snyder v. La Frambraise*, and this is the first time it has ever been controverted. Suppose the present defendant is convicted under the indictment now pending; and suppose he discharges such penalty as may be imposed, will the Attorney General say he would be incompetent to testify upon the trial of the remaining individuals, included with him in this indictment? Surely not; and yet he would stand before the jury, not only a criminal, but a convicted one. And if Gilman would be a competent witness for individuals over whose heads this indictment still pends; whose guilt or innocence is yet to be passed upon; why is this witness to be excluded upon this trial? 'Tis true a witness cannot be compelled to criminate himself—cannot be forced to disclose facts, which if disclosed by him would enable the Government to convict him. But whose privilege is this? to whom does this right belong? To the witness introduced, and to whom the question is propounded, and from whom the evidence is sought to be obtained. But, if a party chooses to disclose facts which may be injurious to himself; if a witness voluntarily discloses his participation in an act which is criminal—who suffers? who is injured thereby? The Government? Not so. They gain, in this way, the disclosure of the crime, and the knowledge of the criminal. The witness? Not so. He waives his privilege, throws from him the shield which the law has furnished him, and thereby braves the danger, and seeks the liability.

*The COURT.* The motion cannot be sustained. An accomplice not indicted with others who may be on trial is a competent witness, although he cannot be compelled to give evidence against himself. The rule is, that the objection only goes to the credibility of the wit-

ness; and if such testimony is not corroborated by the testimony of other credible witness or witnesses, it is not entitled to full credit. The witness is competent, and the jury must judge of the degree of credit to be placed upon the evidence.

*Mr. Cowles* proposed submitting the case to the jury without argument, but the proposition was declined by the *Counsel* for the People.

MR. MURDOCK, FOR THE PEOPLE.

*Mr. Murdock.* Permit me, gentlemen of the jury, before I proceed to the argument of the case, publicly to express the pleasure I felt while listening to the testimony of Mr. Krum. The eloquent, candid, but indignant manner with which he repelled the often repeated story of inefficiency and indecision in the discharge of his important and highly responsible duties during the trying events which have given our city such unenviable fame; and his satisfactory detail of the measures recommended and adopted, must have given gratification to all his friends. And if anything that I may have said tended to confirm public opinion in the truth of reports so prejudicial to him, I feel called upon by every gentlemanly consideration, in this public manner to confess the charges to be unfounded, and that he stands before this community in the character of an efficient and upright Mayor.

I regret, gentlemen of the jury, that in the discharge of my duty to the people, I am called upon to animadvert upon the conduct of men for whom personally I entertain the highest esteem. In every relation of life the defendant possesses as high claims upon our regard as any other individual in the community. Gentlemanly in all his deportment; strictly moral in life, and enterprising in business; few men possess to a higher degree, or deserve, the respect and confidence of their acquaintance, than the defendant, Mr. Gilman. But, gentlemen, he has been charged by the Grand Jury of the State with a violation of the laws of the State, and no matter how wealthy he may be—how useful as a citizen—how pure and unoffending in the general course of his conduct, if guilty

of the offense charged, it is your duty to say, by your verdict, that neither the rich and good, or the poor and profligate, shall violate the law with impunity. It is the palladium of everything dear to freemen. It is lamentable, gentlemen, to consider the excesses to which fanaticism, in the name of our holy religion, often drives the best and most intelligent men. If the defendant had been led by the dictates of the religion he adorns, if he had consulted the precepts of that Divine Master whose professed disciple he is, how different would have been his conduct, amidst the appalling events of the 7th of November last! Did he, who is God alone—did he, when nailed to the cross, curse his cruel persecutors, and die? Did he oppose violence to violence? And yet, gentlemen, the defendants thought themselves justified by the religion of the Savior. It is humiliating to man, to think how weak we are,—how liable, with the best intentions, to err. The warmth of his heart, his benevolent zeal for the good of the oppressed of his fellow-men, will extenuate, but cannot wipe away the guilt of the defendant.

But, gentlemen, this is a question of law. Is the defendant guilty or not guilty? The facts no one denies—they are fully, clearly made. Do they constitute crime is the question. I will not deny that at common law every individual had the right by force to repel a forcible entry into his house, nor will I deny that he had a right to assemble his friends to aid him in so doing—but is it so in Illinois? has every one this right here? is it one of those natural rights which no law can deprive us of? If it is, gentlemen, then our statute is a dead and useless letter. It was manifestly the intent of the Legislature to change the common law, to abridge the right of the defending one's domicile, to an orderly and peaceable resistance, free from violence and tumult. If the defense of property by means of firearms be not a "violent and tumultuous" defense, can any acts constitute the offense? It is the manner in which the defense is made, not the defense itself, which constitutes the crime. We must give the statute its natural and evident import. It may be that the defendant supposed

he was acting under the authority of the Mayor; but is this a justification? The Mayor cannot legalize an illegal act—he cannot give a warrant to commit crime. His office is to maintain law, not to give authority to violate it.

Few States, gentlemen of the jury, have a criminal code so severe as our own. Its provisions, if carried into effect, are amply sufficient to protect the property of our citizens, or to punish the lawless destroyer; and it was the duty of the defendant, as a good citizen, to have fled to it for redress of his injuries. The Legislature intended by the severity of its enactments to manifest its designs to throw around the rights and property of our citizens ample protection, or to punish rigorously its violations. To the law then the defendant should have resorted for redress; he should have reflected, that in our day and country a rabble cannot long hold the ascendancy; that soon a returning sense of propriety will come over the people: that so soon as reason has time to exercise her power, unaided by passion, that love of order, that respect for law, that regard for the rights of others which distinguish Americans, would have exerted their influence over our misguided citizens.

I need not say to you, gentlemen, how much I deplore the tragical event, the details of which you have been so long listening to. It has exerted, and will continue to exert a baleful influence upon our prosperity, and worse, upon our good name. But the evil has been committed, and gone forth to all the world, to blacken the page of our history; it is your proud duty, your high power, to do much to soften the coloring. And how, but by the fearless execution of the law? I will not, gentlemen of the jury, trespass longer upon your time, exhausted by the extended examination of testimony. I resign the case to the able counsel who aid me in the prosecution.

MR. DAVIS, FOR THE DEFENDANTS.

*Mr. Davis.* Having, for the last fortnight, gentlemen of the jury, been confined to my room with indisposition, it is with a perfect consciousness of my own inability (increased



from feebleness) to do justice to my client that I attempt to address you in his behalf; and were it not that I am to be followed by other, and far more able counsel, you might indeed charge me with arrogance and presumption in making an effort in his defense. I must consequently throw myself upon your kind indulgence for the few moments I shall occupy in taking a cursory view of the testimony in this cause. Fortunately for my client, gentlemen of the jury, we have been enabled to sever him from the other individuals who are included in the indictment with him; neither to you or to the prosecution, is it any matter what motive prompted the application; it was a right secured to him by the law; a right which was deemed valuable in its exercise, and which was properly granted us by this court; you have, therefore, only to inquire into the guilt or innocence of my client, without regard to the others who stand charged in the same indictment with him.

I know not, gentlemen, hardly why I stand here; how it is that I am called to defend Winthrop S. Gilman upon a charge of violating the laws of his country. I can hardly reconcile to myself the fact that I am here to defend, and you there to try this individual for an alleged crime; a man who in all the relations of life is respected, beloved, and honored, who has proven the most dutiful of sons, the kindest and most affectionate of husbands and fathers, the most faithful of friends, the most valued as a neighbor and citizen, honored as a public benefactor, and whose memory will be cherished in grateful remembrance for his many acts of private and public benevolence, while that of his persecutors will have been forgotten, or only spoken of with pity and contempt. The best evidence in the power of my client to offer you of his confidence in the purity and uprightness of his motives, the innocence of his acts and the justice of his cause, and of the integrity and impartiality of those by whom he is to be tried, is that he has committed his defense to the hands of a junior counsel. In that confidence, gentlemen, I most fully participate; but it would be criminal in me were I to deny that I enter upon the discharge of my duty with the liveliest



solicitude, for it is neither the evidence or the law, nor the strength of the learned and able counsel that is to enforce it, that we are to contend against. No! we have other and more formidable antagonists; it is the rumor which has floated, the prejudice which exists, and the calumny which has been so industriously circulated throughout this community previous to this trial. You will therefore pardon me when I assure you, that I am not without one lingering apprehension as to the safety of my client, and that is lest you should have unconsciously imbibed that poison which has been so widely diffused; but when I say this, let no one of you understand me as casting the least doubt upon either his integrity or his judgment; in both I have the most unlimited confidence, for I know you to be upright, intelligent and honest; but you were created men before you were appointed to be jurors, and we tremble lest in your hearts you entertained prejudices which may have been imbibed in ignorance, but now cherished almost as virtues. I ask you, therefore, gentlemen, to make a strong effort to rise above all extraneous considerations, and divesting yourselves of everything like prejudice or partiality, to give to the testimony and the law, applicable to this cause, a fair and candid review, and see if you will not be warranted by both in arriving to the same conclusion that we have; that the defendant acted under a fair and honest conviction that he was doing right; that he was in the discharge of his duty to himself in defending his property, and his duty to his country in maintaining her laws. Let me then call your attention in the first place to the indictment, which contains two counts.

In the first you will perceive that the defendant, with others who are therein named, is charged with having "resisted and opposed with force and arms, violently, tumultuously, and unlawfully, an attempt of certain persons unknown, to break up and destroy a printing press, the property of the said defendant, and one Benjamin Godfrey." By the second count, the offense is somewhat varied, and the prosecution have charged that he, with certain other individuals, with force, unlawfully, and in a violent and tumultuous manner, "defend-

ed and resisted'' an attempt then and there being made by divers persons unknown, to break open and enter a storehouse of the said defendant, and Benjamin Godfrey. Thus you will perceive that the government have alleged that the property was in us, and that the defense was made for the protection of our own rightful property; and all the offense for which my client is here arraigned, and for the trial of which you are there impaneled, consists in the fact that he found it necessary to use force and arms in his own defense, and that defense was made in a violent and tumultuous manner. All, therefore, gentlemen, that you have to inquire into is, the manner in which this defense was made; this is the true issue before you and upon it the acquittal or conviction of my client must rest. The people have charged us with making this defense in a violent and tumultuous and therefore in an unlawful manner; we reply, and we ask you from the testimony to believe, that there was no tumult on our part—that the violence we made use of was but proportionate to the attack we were compelled to resist, and necessary to our protection, and therefore justified; but before I proceed to consider the grounds of our defense, let me say to you what in my opinion it is necessary for the prosecution to show, before they can ask you to convict this defendant—they must prove to you the time when, the place where the act was committed, and that the manner in which the act was done was tumultuous. Have they done so? Have they shown this defense and resistance of which they complain to have been made at the time and in the place alleged? Who has sworn to it? Who has told you when? Who has told you where? What witness has proven to you that this transaction took place within the corporate limits of the City of Alton? I call upon the two learned gentlemen who are to reply to me, to answer; and to name if they can that individual who stated in his testimony before you, that the offense charged was committed in the City of Alton. If each and every one of these facts are not distinctly and unequivocally proven, the foundation of this prosecution fails and the whole superstructure must tumble to the ground; for

unless this offense was committed within the corporate limits of this city, neither this Court or the Grand Jury who have presented this bill have any jurisdiction of the matter. Remember you are sitting in judgment upon the liberty and reputation of a fellow man, and the law requires you in the discharge of your duty, either to acquit or convict from the testimony that is adduced before you; you are not to arrive at any fact by deduction, and because the government prove to you one circumstance you are not therefore to presume another; it therefore lies with the prosecution to show you that each allegation in their bill is true, and if they have failed to do so, you, from any knowledge you or either of you may possess separate and distinct from the testimony, cannot supply it; you are there as judges of crime from the facts proved; as jurors, you can do nothing of yourselves, for you are not brought here as witnesses, but as impartial men selected to stand between my client and the prosecution, and sworn to try the issue upon the law and the facts as submitted to you. If therefore in your opinion the people have failed in proving any material allegations in their indictment, no matter how unnecessary it was that they should have made them; I claim the benefit to be derived from such omission. I waive no right, I release no error, I admit nothing that is not proved; standing upon all my rights, I ask at your hands an acquittal of my client, not indeed through the imperfection of the testimony upon the part of the People, but upon the merits; admitting them to have proven all they were bound to before you could convict; but, gentlemen, whatever your verdict may be, the defendant will go hence as he came here, with a pure conscience. Yes, in the sight of God, in the sight of the world, he can lay his hand upon his heart and fearlessly avow his innocence. Your verdict may indeed stamp upon him the semblance of guilt, you may declare that his name shall be enrolled upon the records of this court as a felon, you may doom him to unmerited punishment and consign his person to a dungeon within the walls of your prison. These things in the exercise of your power you may do, but you cannot take

from him an unsullied reputation, a high and unimpeachable character for honor and integrity; you cannot disturb him in the possession of a conscience free from stain, from pollution, from guilt, a conscience void of offense towards all mankind.

In the further remarks which I shall make to you (for I already perceive that my strength fails me), I shall scrupulously abstain from allusion to the events of the exciting past. I shall not recite to you the dreadful, yes! the fearful scenes of the memorable night of the 7th November—memorable to all after time as a period when men could be found to throw away life in an attack upon another's property—and when your streets were crimsoned with the blood of those gallant and undaunted few who had rallied for its defense; nor shall I ask you to travel with me in imagination onward to the future and conjecture the consequences of your verdict—the good or the evil to this community and to posterity, as you may uphold law or sanction licentiousness; far be it from me unnecessarily to recur to an event which has made us as a people a bye-word and a reproach to the whole Union; but on the contrary, would to God that by any act of mine I could pour upon the troubled waters of this excitement the oil of reconciliation—and could restore to this once happy and united people that peace and unity of action with which but a few months since they were blessed; but I cannot do it; the seeds of discord are too deeply sown to be uprooted by human effort, and time can alone allay the raging of those worst passions of the human heart which to us has been attended with such lamentable consequences. I stand here, gentlemen, solely for the purpose of interposing the shield of the law as a protection to a man innocent of the crime alleged against him—not to screen the guilty. I have shut no fact from this jury—have objected to none of the disclosures which have been made—resolved from the beginning the whole facts should appear in this investigation whether it made for us or against us; to you they have been given fully, clearly, and I have no doubt impartially; and I am perfectly willing that my client should be judged by you and by the world—by the

the Mayor's office and request him to rally the law-abiding portion of the community in order to suppress the riot. He further states to you, that shortly after he left the building the mob assembled and made the attack by dashing in the windows with stones, and that before any gun was fired from within, a gun and a pistol had been discharged on the outside by the mob, and that not until the assailants had twice fired did those within resort to their arms for the protection of their lives. Mr. West, who was the next witness on behalf of the people, also fully and in every respect corroborates the testimony of Mr. Keating, and tells you further that John Solomon called upon him early in the evening and told him he (Solomon) knew that Mr. Gilman's building was to be blown up or burnt up that night if the press could not be had, and urged Mr. West to inform Mr. Gilman of the same. Thus you will perceive, gentlemen, that the property (valued at thousands of dollars) and the life of my client was coolly and deliberately determined upon by the mob some two or three hours at least before their attack upon the warehouse of this defendant. Can you then doubt, if the witnesses for the prosecution have testified to the truth, who were the assailants? Can you for a moment doubt but that the firing commenced first with the mob; and that it was their fixed and matured determination not only to destroy the property but the life of my client and his associates? If then the attack was first made from without both with stones and firearms, and the assailants had coolly determined upon blowing up the warehouse and its eighteen inmates, do you believe the defense that was made by my client was disproportionate to the attack? do you believe that it was greater than any man in the exercise of his reasoning faculties would have adopted? If you do not, I then in behalf of this defendant place myself upon my reserved rights—I plant myself upon the rock of the Constitution—I interpose before my client that instrument as his shield; and protected by its letter, guarded by its spirit, I bid defiance to the statute the prosecutor has produced, and laugh to scorn the indictment he has read to you.

But, if, gentlemen, I have failed to satisfy you upon this point, I ask you to grant me your indulgence a moment longer, while I take another view of this case. It is in evidence before you that Mr. Gilman repeatedly sought, from the Mayor of our City, authority to act as he was at last compelled to—that frequent and long were the interviews had with the Mayor upon that subject—and that he had stated to Mr. Krum, that he was anxious that whatever act was done in the protection of the press, should be done under the sanction of the law, and by virtue of authority derived from an officer of the law; that on the night of the 6th, just preceding that of the riot, the Mayor was present in his official capacity at the warehouse of my client, and that, upon the question being asked him what course he intended to pursue if the attack should be made while landing the press, he replied, he should order the mob to disperse, and warn them of the consequences if they did not; and that, if they then still persisted, and his injunctions were disregarded, he should peremptorily give Mr. Gilman and his associates orders to fire upon the assailants. But again, we have further shown to you that on that night after the press was landed and placed in the warehouse, the Mayor advised, or assented, to an arrangement, by virtue of which that warehouse and that printing press was to be guarded by those whom he knew had assembled for the avowed and isolated purpose of protecting it. We have also shown to you, that on the night of the 7th, which resulted in the loss of two lives, when the Mayor went into the building, at the solicitation of the mob, to endeavor to persuade those within to give up the press, and after the death of Bishop had occurred, he was then and there again interrogated by Mr. Gilman, whether he had acted under the authority of the law, and was justified in what had been done, and that to such inquiry Mr. Krum replied in the affirmative; and although the Mayor unqualifiedly testified that such advice was given Mr. Gilman as a citizen and a friend, and as one, who, from his profession, was conversant with the law and the rights of my client under it, and not in his official capacity as Mayor, he

has, nevertheless, also stated to you, that from the knowledge he possessed of all the facts, he did believe that Mr. Gilman supposed he was acting under his official authority. And is it not natural, gentlemen, that he should have so supposed? In all these interviews had by him with Mr. Krum, the uniform advice given him was, that defense might lawfully be made, and that if requisite for completing that defense, firearms might legally be resorted to, and even life taken, and that the act would be justified by the law. Why, let me ask you, should Mr. Gilman, Lovejoy and others hold these repeated interviews with Mr. Krum? If they sought his advice merely as a lawyer, or a friend, or a citizen, would it not have proven sufficient for them that he had given it to them, clearly and unequivocally, during the first interview? Why these constant applications to him at every step they took, and why this great solicitude on their part to have their every act sanctioned with his approbation? The reason is a most obvious and irresistible one: it was because he was the highest civil officer within their reach; clothed, as they believed, with full power to grant them the authority subsequently exercised by them, and because they were anxious and determined that nothing should be done on their part, in the way of resistance or defense, unless under his authority and with his consent. And then, too (that this matter may be placed beyond any doubt as to the firm belief of my client that he was acting only the part of a subordinate to the Mayor), let me recur to the conversation in the store after Bishop's death. When an application was made to him to remain on the inside with them, what was his reply? "I would if I did not think I could do more good out of doors." Did he then disclaim all connection with them in his official capacity, and give them to understand that they were acting without his authority, and upon their own responsibility; or was his reply such as to leave them under the conviction that they were acting under the authority of the law? To my mind this combination of facts is proof most conclusive, that this defendant, naturally, fairly and honestly supposed he had the authority of that



officer for his every act; and if you, gentlemen, should so also believe, even though you wholly disregarded his constitutional rights, you are then bound to acquit him, for it negatives most fully every idea of a criminal intent, and without which no man can be convicted of crime. Never was there a man arraigned before a jury of his country who more conclusively showed his innocence, not only in acts, but in word and thought, than has my client, and he stands before his God and the world, if the testimony in this cause can have any weight, purged of even the shadow of guilt, and with a reputation rendered, if possible, more bright and enviable than he possessed before this indictment was preferred against him.

But I fear, gentlemen, I am tasking your patience beyond endurance, and exhaustion on my part admonishes me that I must draw to a close, notwithstanding there are several points to which it was my intention to have invited your notice. I am fully sensible that I have done the cause of my client but little justice, but am consoled by the reflection that the injury I have done him will be more than repaired by the talents, the experience, and the eloquence of my associate, who will close the argument in his behalf. All that is left me to say is, that I would be doing the most gross injustice to my feelings, did I not return you, gentlemen, my most sincere acknowledgments for the patience with which you have listened to, and the attention you have given my unconnected remarks. I fear that in the course of them I may have displayed an overheated zeal and a warmth of feeling that, in your opinion, was unjustifiable; if so, do not, I beseech you, gentlemen, let it prejudice the rights of my client. I could not avoid it. It is not by mere professional ties that I am connected with him; I am bound to him by the strongest and most enduring ties of friendship; a friendship which may have had its foundation in repeated and unsolicited acts of kindness, bestowed upon me when I most needed them, but which, I am proud to declare, has been matured and strengthened by a subsequent knowledge of his virtues; and never can

I bring my mind to believe that, possessed as he is of all those ennobling qualities which have rendered him a model of social and domestic virtue, he could so far have forgotten himself as to have committed the crime with which he stands charged by this indictment.<sup>13</sup>

MR. COWLES, FOR THE DEFENDANTS.

*Mr. Cowles.* Gentlemen of the jury: the case which you are impaneled to try, is one of no common occurrence, whether it be considered in respect to its effect upon each of us, upon individual security, property, liberty and life; upon the right of free discussion, upon the question whether the law and constitution shall be the paramount rule of action; or whether misrule and the unlicensed will of an irresponsible multitude shall hence forth be our governing authority.

The issue of this trial is to write the character of this community in no illegible impress, but in one that will be known, understood and appreciated of all men; it will be either of a returning sense of justice, a respect to law and the obligations of civilized society; or a closing over of our sky with a dark and portentous cloud pregnant with future ill.

In approaching the defense of the very respectable gentleman, who stands at the bar as a prisoner and a culprit, the question of his guilt in itself considered, in comparison of other and more important results, shrinks into insignificance. In conducting his defense I feel that I am defending the supremacy of law and constitution, the sacred right of individual opinion, of free discussion, and of self defense, against unbridled lawless violence: I then, after hearing the evidence am affected with the same surprise as was expressed by one of your fellow jurors, who on his being examined touching his qualification to sit on the traverse, remarked that he did not understand how a man could be indicted for defending his

<sup>13</sup> By request of *Mr. Bailey*, who appeared in the trial of this cause as one of the counsel for the government, and who followed *Mr. Davis* in an address to the jury, his remarks were not included in this report of the trial.

own property; nor could I conceive how any man in the warehouse could be indicted, much less that the defendant, the builder and owner of the warehouse, and who in the legal defense of that warehouse and the property within it, in which he had a general or special ownership, could be subjected to penal consequences—but this strange attitude is exhibited in the person of the defendant—standing in defense of property, liberty and life—in which defense the blood of an innocent victim had been shed to satisfy the insatiable passion of a lawless multitude, unparalleled in atrocity.

The very act of indicting this individual and his associates, supposes that their acting upon the defensive was criminal.

This right of self-defense addresses itself to this jury, and if by your verdict you pronounce him guilty, you deny it to the defendant, and in effect say that the armed, excited, ruthless multitude without, had the right to judge upon the individual rights of the prisoner—and to carry out that judgment to a forcible, unrestricted execution.

It is then to you that we appeal, as the barrier and rampart, behind which liberty and law may intrench itself—and against which the waves of misrule and disorder may beat in vain. In protecting this defendant you are defending yourselves, you are restoring peace and security to this much injured community.

By what tenure do we hold our property and lives, if not by the organization of society? Are we to go back to an unorganized condition and be subjected to brute force and unprincipled will? or shall we throw around us the shield of the constitution? You will answer by your verdict.

By an amendment to the Constitution of the United States, the right of every citizen to keep and bear arms is secured; the fact then that the prisoner and his associates had arms within the warehouse was in no sense criminal; especially when it appears from the testimony that they were advised of, meditated and threatened violence from without; and when the same force had distinguished itself by its triumphs over

the freedom of speech and of the press in the destruction of other printing presses.

By the Constitution of this State, p. 45, it is provided, "that no person shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." The violation of this provision of the Constitution in the attack upon the life and property of the prisoner is manifest; so much so, that he that runs may read; unless it be assumed that the violators of law and order were his constitutional peers!

It is proved that Mr. Gilman and his partner owned the warehouse, and received the Observer press for safe keeping on storage, and being responsible to the actual owner, had such a property in it as justified him in resisting force by force. The law knows no difference whether the property be general or special in regard to the right of defending it, or in regard to criminal liability for invading it.

But it may be argued by the Attorney General that the press, which was the object of attack and defense, was intended to promulgate principles, and discuss subjects, which many citizens repudiated; and therefore the right to destroy the press was complete! and that any means might be used to accomplish that end.

We again recur to our Constitution, which provides "that no law shall ever be passed to impair the freedom of speech or the liberty of the press, and that every citizen may freely speak, write and print, being responsible for the abuse thereof." Is this a responsibility to a mob! or to the judicial tribunals of the country, the peers of the person charged with abuse?

In this land of constitutional immunity, freedom of speech and the press, it is reserved for those living under that immunity, to supervise the press and prescribe what shall, and what shall not be printed; and even whether the press in a given place shall exist! Thus arrogating to themselves a power, which only exists in acknowledged arbitrary governments! The exercise of which power is the most effective in-

strument of despotism; and this power is assumed by some that call themselves the democracy of the country dyed in the wool.

What but the exercise of this power in France and Germany is it, that has stifled the spirit of liberty in those countries, and perpetuated the arm of tyranny?

This interference with the liberty of the press is one that American citizens will not brook or give place to; nor will they yield that to an irresponsible multitude, of which their Legislature could not deprive them! This is their political aegis.

Are these reservation in behalf of the people, preserved in an American Constitution to be an idle and unmeaning principle? And shall it be in vain that our sires poured out their blood like water, and left their whiting bones scattered in many a glorious, well fought field to secure them?

And shall their recreant sons yield up tamely this best of political gifts? It is impossible, if any drop of the blood of their ancestors yet animates them, and unless "judgment is fled to brutish beasts, and men have lost their reason."

An examination of the proofs will justify most fully the accused, before this jury and all who understand the condition of those defending the property. It was a case verily of self-defense, upon the most valid and unquestionable grounds.

The arrival of the press was notorious: in anticipation of its arrival, the prowling conspirators against the Constitution were on the alert; and after its arrival, when the Mayor had been desired to be present at its arrival to take measures for its security, and had actually superintended its landing and deposit at Godfrey & Gilman's warehouse, at a late hour of the night a few of their dark forms were seen hovering about at a distance, and the next day developed fully the avowal of their heartless and atrocious design, which was to blow up or burn the building where the press was deposited, if necessary to destroy it. Not unapprised of such an intention from the conspirators, but being wholly incredulous as

to its truth, that band assembled in the warehouse on the fatal night of the 7th, to repel if necessary, any attack upon the house and property of the accused; they were fired upon from without by at least two guns or pistols; and showers of stones were thrown into and against the building before any defensive act was done by those within; and as is proved to you, such was their design, as avowed and agreed among themselves. Now can it enter into the mind of any human being, that these persons in their act of self-defense, were guilty of a riot? Every ingredient of crime is wanting. It is apparent that no criminal intent existed in their minds. By our criminal code there must exist a joint operation of act and intention, to constitute crime; every act of the accused exhibited a want of criminal intention. It is true the first blood was shed by those in the defensive; but it is equally true that it was a legitimate and justifiable consequence of their exercise of the right of self-defense. After Bishop, one of the assailants, had been shot, and those without had been stimulated and infuriated by the use of intoxicating drink, freely administered at certain houses miscalled "coffee houses," a second attack was made upon the building, and the cry was raised to fire the building. You have seen that Mr. Gilman in the most kind and conciliating terms remonstrated with those without, and avowed the determination of himself and friends to defend the property and possession at the risk of their lives. but that they had no desire to injure anyone without. This reasonable intimation served no other purpose but to produce a reiteration of the design of the mob.

The Mayor with other civil officers appeared, and ordered the rioters to disperse; this was disregarded; and the Mayor was desired to enter the building and propose a capitulation, and authorized to stipulate for those without that those within should depart unharmed; and while this very negotiation was carrying on, fire was communicated to the warehouse, and those within urged to depart to save their lives and prevent the warehouse from conflagration. Mr. Gilman was incredulous, as was the Mayor; they had no conception of the dark

malignity which actuated those without. The thing threatened was incredible! against whom? and for what?

Winthrop S. Gilman had been the first man to vest his capital in Alton and give it importance; his patronage had given bread to many of the inhabitants of that town; he had been with the town in its struggling infancy, and its palmy state of manhood; when it had been visited by the "pestilence that walketh in darkness," before which the forms of men were shrinking and withering, he stood by a ministering angel, and now this population were turning against him "like dogs upon the hand that fed them, to bite and devour." The dark characters of such deeds can only find a parallel in the regions below.

And for what was all this? Merely because a disposition had been expressed to sustain and protect the freedom of speech and of the press.

The accused and his associates were among those most deeply interested in the prosperity of Alton, entire strangers to riot and to that society in which its elements consisted. There was a pledge in their character which would and ought to weigh deeply with the jury. But they had entered upon the subject after cool reflection, and their determination was not the result of a sudden ebullition of passion—but one to which their consciences pointed in fortifying approbation. They knew they were in the exercise of a constitutional right, and they felt in that respect they would be justified. The public authorities had been previously consulted as to their right of self-defense, and had approved of the assertion of that right, in repelling force by force. But what did all this avail against a mob! There they stood, that little band; within that building there was no riot, no tumult; but that deep silence which precedes great actions! Without all was tumult, uproar and violence; upon those without the nerveless arm of the law had been exerted in vain—within, the same arm had approved and justified. Matters now arrived at a crisis; the building was fired over their heads and they were besought by some benevolent individuals to yield to that lawless force, which



they were forced to do, to save their lives, and prevent the total destruction of the building and one hundred thousand dollars in value of property within. And yet these individuals were fired upon as they fled from the horrors of that night. And the assailants entered the citadel, and destroyed that press. Here was a consummation of all that was vile and atrocious, all that tyranny could inflict, upon the rights and liberties of a free people. The arm of the law was broken, the sword of justice trampled on, and treason was perpetrated in its fullest form. "Then you and I, and all of us fell down, whilst bloody treason flourished o'er us."

A calm review of this transaction cannot but justify the defendants—on the ground of a want of criminal intention as a legal justification. It is laid down in authors of the highest authority in criminal law, that a man may assemble his friends in his own house to prevent an unlawful entry, or to protect his property therein. 1 Russell on Crimes, vol. 1, p. 254. Hawkins' Pleas of the Crown Book, v. 1, ch. 65, p. 158. This right is by the law of nature, aside from constitutional right; wherever, as here, the civil authority is inadequate, we are remitted to our original rights. The law of civil society only regulates the mode of self-defense; when organized society fails to afford protection, we are then thrown back upon our original rights, with power to defend them, either in regard to person or property, as we best may. Gilman applied to the civil authorities for protection—it was not given. Where was the city authority in that dark hour of violence and misrule? As though it had not been. Mr. Gilman stands, therefore, before you, gentlemen, justified in the sight of men and of God; by all the principles that are in the human heart; by the wisdom of ages; and if you, gentlemen, can say he is guilty, pronounce such a verdict, and add to the dishonor of the country, that what a lawless mob executed, twelve men were found to justify and approve.

THE ATTORNEY GENERAL, FOR THE PEOPLE.

*Mr. Linder.* I feel, gentlemen of the jury, that I have to contend against fearful odds, when I have the conviction

pressed home upon me, by the argument of the gentleman, that as citizens you probably were influenced by the excitement occasioned by the fearful tragedy which has been acted in this city; and am reminded that, as jurors, you may not have forgotten the prejudices which you imbibed before you were sworn to try this issue. I feel that the odds against me are greatly increased, when I recollect the threats made use of to frighten you from returning a verdict of guilty, and when I remember that, in anticipation of such a verdict of guilty, you were denounced by the venerable counsel who has preceded me, as participators in the crime for which this defendant is now on trial; as coadjutors in the treason which was committed by those who destroyed the press. But, gentlemen, if you have feeling upon this subject you may control it: all may divest themselves of prejudice, if they are determined to do so.

You must have observed how hampered the defense has been; how the counsel, in their remarks, crippled along. All their remarks showed that they thought they were prosecuting the outside, instead of defending those who were guilty of a riot in the inside of the warehouse. I ask you to travel along with me as I relate to you the facts in this case. Last August, the first press was destroyed: the "boys" broke it to pieces and threw it into the river. Another was brought here, and after repeated failures to establish a press by which they could disseminate their fiendish doctrines, another course was adopted. A convention was called at Upper Alton. Alton was chosen as the scene of their operations. Alton was to be made the theatre of their preachings—and all their presses, and all their preachings, and all their conventions, were to be held in the poor, devoted City of Alton. Dr. Beecher was warned to attend, and these people thought they were going to have it all their own way. But it happened that these Western boys knew a thing or two: knew a trick worth two of that; and so they got together and out-voted them, and the convention blew up in smoke. It was a farce. Not satisfied with this; not satisfied with the blowing up of this farce; not satisfied with the result of this convention, headed by inter-

lopers from other States, headed by an alien to our laws and our country, they issued their handbills, they made proclamation in the streets of their intention to preach their doctrines in the church. They posted up placards, notifying the world that Dr. Beecher would preach upon this damning doctrine of abolition. Now mark the course of these people; these advocates of good order; these lovers of religion. These men, these peace-loving men, who profess to be the followers of the meek and lowly Jesus, mark how they besiege the Mayor, how they importune him to go to the Church; how they beseech him to attend their meeting; how they notify him that arms, yes, arms, are provided in case of disturbance. And here let us pause. Is this the age when virtue, religion and morals are to be forced upon us by the strong arm of power? when, if we will not hear, the sword shall compel us to do so? when, by muskets and bayonets, we are to be compelled to swallow, whether we will or not, any doctrine which this set of people may tell us is good for instruction, or profitable for salvation? And these men, who assemble with arms, who run bullets by the tumbler full, who parade their armed men within the walls of a Church, are they to claim exemption from crime under the plea that they are followers of a heavenly master? Save one solitary instance, where do we find the apostles, the original christians, with arms in their hands? and in the only solitary instance in which they resorted to the strong arm of power, how quick, how decided the rebuke which their peaceful Master gave them!

But here these men, these peace-loving men, as they call themselves; these advocates of law; these friends of good order; these professed disciples of him who came to bring peace and good will to all men, don't find such a peaceful course answer their purposes quite so well. So they resort to arms for protection; and they pollute the worship of their peaceful Master by a martial array around the altar dedicated to his service. Mark how peaceful their course runs! In this instance, there were first, prayers! then a sermon! then a stone!—and then, "To arms, boys."

But let us go to the 7th, memorable as the closing scene in this comic tragedy. And, to proceed in regular order—the arms, the next we hear from them, were brought from the church; “fixed,” as the witness says, and Tanner calls upon boys to run him a tumbler full of bullets; and people are called to array themselves upon the one side or the other of this vexed question. Forty-two men are found willing to form themselves into a military company; men are drafted from among you; enrolled in the service; officers are elected, and the post of honor, the title of Captain of a squad of these men, is conferred upon my corpulent friend, William Harned. There is marching and countermarching; drilling and exercising; file movements, and movements in echelon, up in the garret of a warehouse, at dead of night. I can’t imagine how they managed to do all this in a place where I should hardly have expected my friend the Captain would have found room to have squeezed himself in half-file, much less, to have managed to drill and manoeuvre a whole company of men. So that you see, gentlemen, when all other sources fail; when they find the conventions won’t do, and armed men at churches won’t answer their ends; the doctrines of abolition are to be forced down our throats by means of the formation of an independent, peace-loving, military company, with my friend and brother counsellor Mr. Chickering as clerk, and my honored friend, Mr. Harned, as Captain. And was not all this calculated to disturb the peace? was not this calculated to excite terror? to stir up the feelings? to rouse the passions, and to provoke an attack? Precisely what we should have expected, exactly what these peace-loving men should have anticipated, did result.

Gentlemen, a man who is conscious that he is acting from right impulses, wants no advice; he acts from his own honest convictions. But Mr. Gilman was always seeking advice; always asking counsel and direction; always proffering his services; always stating his readiness to act; always declaring his willingness to be employed, and asking orders; always seeking, in every way, in every manner, and at all times, to

gain the arm of civil authority. Here was a party for war in times of unalloyed peace, and, for aught we know, "a party for peace in times of war."

My aged friend has read to you law, under which he asks you to acquit this defendant. He has resorted to the books, and read authority to prove to you that a man's house is his castle; and that force may lawfully be used by the owner to defend it against the entry of those who would trespass. But the law speaks of a man's house; of his domicile; of the place where he lives; of the place which he has provided for his family, and not of one's store; not of a warehouse which is erected for the storage or sale of articles of merchandise. Who had threatened to attack these men in their domicils? Who had threatened to destroy thir houses? or even to break open and enter them to destroy any articles of property kept therein?

But the press came at last: the press which was intended to preach insurrection, and to disseminate the doctrines which must tend to disorganization and disunion. With what delight they caught the first glimpse of their new-born child; with what joy they hugged it to their hearts! It was consigned to the tender care, to the fatherly protection of Mr. Roff; but by mutual agreement, from some cause or other, perhaps from fear that it would be taken from the arms of Mr. Roff, and like its predecessors, be consigned to the bosom of the Father of Rivers, its destination was altered, and it was received by Mr. Gilman. And a noble thing they thought this was: a fine arrangement they thought this would be, I doubt not.

Mr. Gilman was popular; he was loved; he was respected and honored; he was wealthy; and doubtless, gentlemen, they supposed that if it was once under his charge, all would be well; that the press would be safe, and the flag of abolition would wave in triumph over the prostrate City of Alton. These men sought the battle; they volunteered for the warfare; they acted before the necessity called for it; they waited not for the call of the law, but madly and rashly rushed to the contest and the blood of the unfortunate Bishop, and the

infatuated Lovejoy, flowed in consequence. They had no direction from your civil officers; they had no authority: and they must suffer the consequences. It probably is true, as a witness has told you, that they determined not to fire till they were fired upon. They did not want to strike the first blow. And, gentlemen, their conduct puts me in mind of the manner in which we used to act as long ago as when we went to school. We felt cross; we wanted to fight; but like these grown up boys, we did not care about striking first. So one would put a chip on his head, and then tell another to knock it off, if he dared: and another would draw a line on the ground, and planting himself behind that, would dare his adversary to cross it; or bid him keep off, if he knew what was good for himself.

Admit that it is lawful for a man to assemble his friends for the forcible protection of his domicile; is it therefore lawful for him to assemble them in a warehouse, and importune the officers of the law for authority, and under cover of advice given as a friend, provoke a fight? Suppose this press had not been guarded; suppose that taking advantage of the absence of those who had assembled for its protection, the mob had destroyed it. Had these people no remedy? Is there no law which would have given them redress? They talk of being friends to good order; lovers of law! Have they not taken the law into their own hands, and violated the laws of man and of God in depriving man of life? And for what? For a press! a printing press! A press brought here to teach rebellion and insurrection to the slave; to excite servile war; to preach murder in the name of religion; to strike dismay to the hearts of the people, and spread desolation over the face of this land. Society esteems good order more than such a press: sets higher value upon the lives of its citizens than upon a thousand such presses. I might depict to you the African, his passions excited by the doctrines intended to have been propagated by that press. As well might you find yourself in the fangs of a wild beast. I might portray to you the scenes which would exist in our neighbor states from the

influence of that press: the father aroused to see the last gasp of his dying child, as it lays in its cradle, weltering in its blood; and the husband awakened from his last sleep by the shrieks of his wife as she is brained to the earth. I might paint to you a picture which would cause a demon to start back with affright, and still fall short of the awful reality which would be caused by the promulgation of the doctrines which this press was intended to disseminate. Bear with me while I turn your attention to a law of this State:

Be it enacted by the people of the State of Illinois, "That the judges of the Supreme Court, throughout the State, the judges of the Circuit Courts throughout their circuits, and justices of the peace in their respective counties, shall, jointly and severally, be conservators of the peace, within their respective jurisdictions, etc. And shall have power to cause to come before them, or any of them, all persons who shall threaten to break the peace, or shall use threats against any person within this State, concerning his or her body, or threaten to injure his or her property, or the property of any person whatever; and also, all such persons as are not of good fame, and the said judge or justice of the peace, being satisfied by the oath of one or more witnesses of his or her bad character, or that he or she had used threats as aforesaid, shall cause such person or persons, to give good security for the peace, or for their good behavior towards all the people of this State, and particularly towards the individual threatened."

Here there is law to suit the case of these individuals. Why did they not resort to it? They were threatened; their property was threatened; why not take the redress pointed out and given them by the law? They knew the individuals who threatened; why not go to a Justice of the Peace, enter their complaints, and bind the boys over to keep the peace and be of good behavior? Why not do this, instead of assembling their friends who would make law for themselves, and prostrate that enacted by competent authority? No, gentlemen, these men did not want to take the course of the law; their whole course was a crusade upon law; a crusade against your Constitution, a war against right; a war against peace; a war against liberty and good order.

But, gentlemen, I regret that in the execution of my duty, I am obliged to prosecute this defendant. I respect him as a



man and a citizen. I regret that he suffered himself to be drawn into this excitement. His honesty and ingenuousness have been taken advantage of, and he made the dupe of others more artful and designing than himself. I cannot believe that this defendant, of his own accord, would ever have placed himself in a situation, where, by any possibility, criminal intention could have been manifested, or criminal act committed. But, like poor Tray, who you know was a very honest dog, this man must suffer, because he was caught in the company of Tiger. These abolitionists have got the smell of this man's money, and they have hung round him; they have dogged his pathway through your streets, they have besieged him in his place of business, they have fastened their fangs upon him, and they will not leave him till they have drawn the last drop of blood from the quivering fibers of his flesh; I mean the last dollar from his purse.

You are urged to acquit this man; to say that his acts are justified because the attack upon his property was of that nature that he could not repel it, and unless he had assembled his friends, armed them and resorted to the strong arm of force. Can one wrong be justified because another wrong was committed? There is no set-off in crime. The prayer sometimes made in other places, "Excuse me because Bill has done worse," is not good authority here. You are sworn men; sworn not to say who was most riotous, which party had the most law; but sworn to try the guilt or innocence of this defendant, by the law and the evidence. This meeting was dangerous, doubly dangerous, because it had the outside appearance of law about it.

The fact that these people assembled together, that they, when so assembled, protected or endeavored to protect, their property, is not in itself criminal; but it is the manner in which such assemblage and such defense was made, that we charge as unlawful. It is the manner in which such defense was made, that has brought this man to your bar, to answer to his country for the offense he committed.

The purpose of petitioning is lawful, and men may assemble

and do assemble for the exercise of their rights in the fulfilment of that purpose almost daily. The purpose of mustering the militia is lawful, though these meetings are getting to be quite rare, but yet, if a large number of men should assemble with arms in their hands, even if for the purpose of consulting about matters of common grievance, or with the design of petitioning to your Legislature, I hardly think my venerable friend upon this defense would pronounce such assemblage lawful. It would be calculated to excite terror and distrust; it would be calculated to disturb the good order of the community, and lead to a breach of the peace, and therefore it would be unlawful. It is the wisdom of law to prevent crime, rather than to punish criminals. The knowledge of its provisions is within the reach of all men, and if men may know their rights and liabilities, and will not, or, if knowing the law, they wilfully violate its principles, let them feel the power they have despised, let them suffer from the vengeance they have braved.

If Mr. Gilman is indicted for acts done in defense of his natural rights, if he is to suffer for his prosecution of a good cause, let such considerations be addressed to the Court, in mitigation of punishment; they should not be urged to you, in justification.

Who questions the lawfulness of the act done, by these defendants? Who doubts the unlawfulness of the manner in which those acts were done?

Some forty individuals assembled in the first instance, some fifteen or twenty remained, with firearms in their hands, well provided with ammunition, with tumult, with disorder, or, as the gentleman has told you, with the stillness of the calm which precedes the storm; but the stillness made not the thunder and lightning of that storm less fierce, or less fearful, when it burst.

It was unnecessary that Gilman should have fired a gun; the laws, as I have shown you, are broad enough to have insured his safety, amply sufficient to have afforded protection

to his property. If he chose to strike a blow for his own rights, let him suffer the consequences.

And the address to the mob, "We will not give up the press," but have resolved to lose our lives, if necessary, in its defense, affords conclusive proof, bears ample testimony to the intent, by which this defendant was actuated. And that other remark, proceeding from him who was the first victim to its truth, "We must not lose a fire;" how prophetic the exclamation!

Go, then, gentlemen, if you can, and say upon your oaths this defendant is not guilty; regard the purity, the honor, and integrity of his character; value the kind feelings, the expanded benevolence, the generous spirit, the warm heart of this man as highly as you choose; but in paying a just tribute to these feelings and qualities of the man, forget not the calls of your country, the demands of the law.

I will not threaten you, I will not warn you of your danger in returning a verdict of "not guilty," by way of intimidation. I will not say, you will not be safe in returning such a verdict. I believe there is no danger; I will guarantee your safety; I will underwrite for the City of Alton.

No, gentlemen, you need no such protection, you are safe in returning any verdict; safe in your own high characters as men; safe in your sacred characters as jurors. Neither are you to be affected by calumny; such weapon would fall harmless at your feet.

But remember, that when men like Mr. Gilman are convicted; when they are held amenable to the laws for their acts, and the natural consequences of those acts; a salutary chastisement is inflicted upon the individual, and a useful lesson taught to others, who are humbler in life than the accused.

Go then to your retirement, act independently, without fear or prejudice, honestly, without favor or affection. I put the cause into your hands; weigh well the evidence, examine carefully the law, and pronounce fearlessly your verdict.

## THE VERDICT.

The *Jury* retired, and after an absence of about fifteen minutes came into court and declared a verdict of *Not Guilty*.

*January 17.*

*Mr. Linder.* Upon consultation with the Prosecuting Attorney for the city, we both have come to the conclusion that the trial of the individuals included with Mr. Gilman in the indictment would result in the return of a similar verdict as the one given in the case of Mr. Gilman, and I therefore will enter, with permission from the Court, a *nolle prosequi* against Enoch Long, Amos B. Roff, George H. Walworth, George H. Whitney, William Harned, John S. Noble, James Morse, Jr., Henry Tanner, Royal Weller, Reuben Gerry and Thaddeus B. Hurlbut.

Upon proclamation the aforementioned individuals were discharged without day.

## THE TRIAL OF JOHN SOLOMON AND OTHERS FOR RIOT, ALTON, ILLINOIS, 1838.

### THE NARRATIVE.

The Alton citizens who had defended their own and their neighbors' property, having been acquitted, the men who attacked the warehouse, destroyed the press and killed the owner, were next brought to trial, not for murder, but for simple riot. These were twelve in number, two of them having fled from the city.

The evidence was most complete. One witness<sup>a</sup> proved that some of the prisoners had told him that "the boys were going to blow up the warehouse if the press was not given up"; that others of them were in the line of men which went with arms in their hands from the grocery where they had assembled to the warehouse; that stones were thrown at the building and guns discharged; that shots came in reply from the inside; a man in the crowd named Bishop was hit, who was carried away by some of the defendants who said that one of their men had been wounded; that Mr. Gilman addressed the crowd from the window, requesting them to desist, as they intended to defend the property with their lives, to which one of the prisoners, as spokesman for the rest, replied that they were determined to destroy the press even if it cost them their lives.

The Mayor<sup>b</sup> and a Justice of the Peace<sup>c</sup> identified several of the prisoners as having arms in their hands that night, declaring that they would have the press, and one was seen going towards the warehouse with a torch, swearing that he would burn down the building. After the killing of Lovejoy, the defenders left the building and were fired on by some

<sup>a</sup> H. W. West, p. 597.

<sup>b</sup> John M. Krum, p. 599.

<sup>c</sup> Sherman W. Robbins, p. 603.

of the crowd as they retreated; thereupon some of the prisoners at once entered the warehouse, threw the press out of the window, and broke it up with a sledge-hammer.

The only defense made by the prisoners' lawyers was that the press did not belong to Mr. Gilman and that he had no duty to defend it, and that all the prisoners had not been identified as among those who had attacked the building. The jury, however, in accord with public opinion, acquitted them all.

### THE TRIAL.<sup>1</sup>

*In the Municipal Court of Alton, Illinois, January, 1838.*

HON. WILLIAM MARTIN,<sup>2</sup> *Judge.*

*January 19.*

The following persons—John Solomon, Solomon Morgan, Levi Palmer, Horace Beal, Josiah Nutter, James Jennings,<sup>2a</sup> Morgan Jennings, Jacob Smith, David Butler, William Carr, James M. Rock and Frederick Brucky—had been indicted for a riot, committed on the night of the 7th November, 1837, in the City of Alton, in entering the storehouse of Benjamin Godfrey and Winthrop S. Gilman, and breaking up and destroying one printing press, the property of the said Benjamin Godfrey and Winthrop S. Gilman.<sup>3</sup>

<sup>1</sup> *Bibliography.* See *ante*, p. 532.

<sup>2</sup> See *ante*, p. 532.

<sup>2a</sup> "It has always been believed by those who had the best opportunities for knowing, that Lovejoy was killed by Dr. James Jennings. . . . Jennings it is said was cut to pieces in a bowie-knife fight in a Vicksburg bar-room several years later. One of his comrades, Dr. Beal, while attached to a scouting party of Texas Rangers, was captured by Comanche Indians and burned alive. I think the last survivor of the mob died some years ago." Dimmock's Lovejoy, p. 23.

<sup>3</sup> The Grand Jurors, chosen, selected and sworn, in and for the body of the City of Alton, in the county of Madison, in the name, and by the authority of the people of the State of Illinois, upon their oaths, present that John Solomon, Solomon Morgan, Levi Palmer, Horace Beal, Josiah Nutter, James Jennings, Jacob Smith, David Butler, William Carr, and James M. Rock and Frederick Brucky, all late of the City of Alton, in the County of Madison, and State of Illinois, on the 7th day of November, in the year of our Lord

Morgan Jennings and Frederick Brucky, not having been arrested, the remainder of the prisoners were arraigned.

*Francis B. Murdock*,<sup>4</sup> City Attorney, and *Alfred Cowles*,<sup>5</sup> for the People.

*U. F. Linder*,<sup>6</sup> *S. T. Sawyer*<sup>7</sup> and *Junius Hall*,<sup>8</sup> for the Defendants.

*Mr. Linder* presented a demurrer to the indictment alleging that, "The said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that they the said Solomon, etc., are not bound by the laws of the land to answer the same; and this they are ready to verify. Wherefore, for want of a sufficient indictment in his behalf, they pray judgment and that by the Court here they may be dismissed and discharged from the said premises, in the said indictment specified."

*Mr. Linder.* This demurrer has been drawn up, and I now present it for the purpose of saving the time of the Court and also saving the jury from any trouble in the case, if the indictment is defective. It

one thousand eight hundred and thirty-seven, with force and arms, at the City of Alton aforesaid, and within the corporate limits of said city, unlawfully and with force and violence, did enter the storehouse of Benjamin Godfrey and Winthrop S. Gilman, there situate, and one printing press, the property, goods and chattels of the said Benjamin Godfrey and Winthrop S. Gilman, then and there being found, did, unlawfully, riotously and with force and violence, break and destroy, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the State of Illinois.

<sup>4</sup> See *ante*, p. 533.

<sup>5</sup> See *ante*, p. 533.

<sup>6</sup> See *ante*, p. 533.

<sup>7</sup> SAWYER, SETH THOMPSON. (1806-1895.) Born Reading, Vt. Read law with Nathan Sawyer at Medina, N. Y., 1830. Removed to Illinois in 1831 and studied with Judge Semple at Edwardsville. Became his partner until 1836, when he removed to Alton. Was State Printer in 1836 and filled the office of Notary Public. Reviser of City Ordinances and United States Commissioner. Was a real estate lawyer and an esteemed citizen of Alton for over sixty years. See Norton Centennial Hist. of Madison Co.; Brink Hist. of Madison Co.

<sup>8</sup> HALL, JUNIUS. (1811-1851.) Born Ellington, Conn. Graduate Yale, 1831. Practiced law at Edwardsville, Ill., 1835-1840. Removed to St. Louis 1840 where he practiced law for six years and then went to Boston, where he became a representative of that city in the State Legislature. See Brink, Norton, Yale Catalogue, 1901-1910. "Halls of New England." (D. B. Hall.)



is not presented from any fear I have as to the result of this trial; nor from any apprehension I feel as to the fate of the defendants. I know how useless it would be to consume time in the investigation of the facts of this case; if, after a verdict, a motion in arrest of judgment could be sustained, upon the ground that the charge as set out in this instrument is not properly made. And I have a disposition, too, to allay any heartburnings which may have been felt in this community. I have made up my mind that this indictment is defective, that the offenses with which the prosecuting attorney has charged us, are not properly alleged, and I ask the attention of the Court to sections 113, 115, 116, 117 of the criminal code.

Sec. 113. "If two or more persons assemble together for the purpose of disturbing the public peace, or committing any unlawful act and do not disperse," etc.

Sec. 115. "If two or more persons shall assemble together to do an unlawful act." etc.

Sec. 116. "If two or more persons shall meet to do an unlawful act, upon a common cause of quarrel, and make advances towards it," etc.

Sec. 117. "If two or more persons actually do an unlawful act with force or violence against the person or property of another with or without a common cause of quarrel, or even do a lawful act in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a Riot," etc.

Now it will be seen that all these sections contemplate an assemblage; a meeting of two or more persons for an unlawful purpose. But it will be seen that this indictment is framed under the 117th section; and I ask of the Court a close examination of that section, and I expect that the Court will give a rigid construction to it. Criminal laws are always construed more rigidly than any others, and I ask your Honor to construe this law strictly. I will not trouble the Court with the first principles of law. I will not repeat the general rules. Every one knows, that if an indictment is framed so as to cover an offense specially described by statute, that the letter of the statute must be followed. That if the offense charged in the indictment differs from that specifically pointed out, and defined by the statute, that it is a fatal variance, and may be taken advantage of by demurrer. Every one knows that more strictness is required in drawing an indictment under a statute than by common law.

Now for the indictment. The Grand Jurors, etc., present, that James M. Rock, etc., on, etc., at, etc., "with force and arms unlawfully, and with force and violence, did enter into the storehouse of Benjamin Godfrey and Winthrop S. Gilman, there situate; and one printing press, the property, goods and chattels of the said Benjamin Godfrey and Winthrop S. Gilman, then and there being found, did unlawfully, riotously and routously, and with force and violence break and destroy." Now, sir, in the 117th section of the criminal code under which this indictment is framed, there are two distinct offenses; and the wording of the statute requires that each of these

offenses should be charged in a particular manner. Now in an indictment under the 116th section, if there was an omission, in stating that the act alleged to have been committed was done with a common cause of quarrel, such omission would be fatal.

If this indictment is framed under the second clause of the 117th section, it should set forth the offense in the words of the statute, and these individuals should have been charged with doing a lawful act in a violent and tumultuous manner. But it is not so, and therefore it is under the first part of that section that this indictment was framed. And let us see if these two apparently independent and distinct offenses, specified in the 117th section are not so closely, so directly and intimately connected in their character and nature, that an allegation of a violent and tumultuous manner, is not necessary in charging both offenses.

If two or more do an unlawful act with force and violence, or even do a lawful act in a violent and tumultuous manner, which manner attaches to both offenses, they shall be guilty of riot. The two clauses of the section being connected by the nature of the language employed to define the offenses, the violent and tumultuous manner is necessary to the completion of both offenses. There is no period, no punctuation of any kind, nothing which separates the two clauses of the section, unless it be the words with or without a common cause of quarrel, and do these words, slipt in as they are in the middle of a sentence, sever the offenses? Do they make the clouses and offenses so distinct, as that what is necessary to one, is unnecessary to the other? If we can judge by force of language what necessarily attaches to an offense; if we can judge by the nature of the language employed to define what constitutes crime, a violent and tumultuous manner must be alleged in an indictment under either of the clauses of this section. A tumultuous manner should be attached to both—it is required by the language of the statute, and if it is dispensed with in practice, the omission can be taken advantage of, and the indictment be quashed, or the judgment be arrested.

The COURT. No objection need be made to the demurrer: the argument would be applicable, and entitled to consideration if the words in a violent and tumultuous manner were not omitted in the first clause of the 117th section. Two distinct offenses are there defined; one, the doing an unlawful act; the other a lawful one. A lawful act may be done with force and violence, and still the individual be guilty of violating no law. An unlawful act is criminal in its very nature, and the manner in which it is done, determines the nature of the crime, whether it shall be of a higher, or lower denomination. The Demurrer is overruled.

Mr. Linder. I don't myself see any great force in the demurrer: it was drawn up by my brother Sawyer, and at first did not know but I might make something of it.

A plea of *Not Guilty* was entered by all the defendants.

Mr. Linder. I know the opinion of the Court upon the point, but

I conceive that each of the defendants is entitled to a peremptory challenge of his full number.

JUDGE MARTIN. The Court is willing that each of the individuals indicted for this offense may have a separate trial if he requires it; inasmuch as the rule was adopted in the indictment against Gilman and others. But for the purpose of saving time, the Court is willing to order a *nolle prosequi* to be entered in favor of any of the defendants, against whom the People shall fail to produce any evidence of guilt, that such acquitted persons may subsequently testify for the other defendants.

The following jurors were then accepted after an examination on the *voir dire*: Timothy Terrell, John P. Ash, William S. Gaskins, George Allcorn, John Clark, William P. Hankinson, Richard P. Todd, John Wheeler, Walter Lachelle, Daniel Carter, Samuel W. Hamilton, E. Breath.

*Alexander Botkin.* I have formed no opinion as to the guilt or innocence of the defendants in entering the store.

*Mr. Cowles.* The charge of riot; have you formed or expressed an opinion as to the guilt or innocence of any of the individuals upon that charge?

*Mr. Linder.* No riot is charged in the indictment.

*The Juror.* I saw some of the individuals indicted, in the street that evening, but I did not see them beyond State street, and I have formed no opinion as to their guilt or innocence under the indictment.

*Mr. Cowles.* It matters not whether the juror had formed an opinion as to the existence or truth of certain facts. If he has formed an opinion that certain facts, if proved, will not constitute a riot, then he is incompetent.

*Mr. Linder.* My opinion is this: that the People can only convict these defendants upon the charge alleged against them in this indictment.

*Mr. Cowles.* The jurors are judges of both law and fact; if they have formed an opinion upon the law, provided the facts are proved, then they are not, and cannot be impartial jurors. The question which should be propounded to this individual is, whether, supposing certain facts are proved, he has formed an opinion.

The COURT. Two essential things are necessary to sustain an indictment. First, that certain facts should be proved to have existed; and secondly, that those facts should be such as to constitute an offense. The juror should not be asked whether he has formed an opinion as to the existence of certain facts, but whether he has formed an opinion as to facts constituting guilt. The indictment is under the 117th section. Certain facts are set forth, but the charge is riot. If any juror has formed an opinion as to the innocence or guilt of the charge, then he is incompetent.

*Mr. Linder.* My question was whether the juror had formed an opinion of the guilt or innocence of the individuals as to the charge in the indictment.

The COURT. The individuals on trial are charged with having committed a riot. Have you, Mr. Juror, formed an opinion of their guilt or innocence upon that charge?

*The Juror.* I have not. I know nothing of the facts. But does not the fact of my having been elected justice of the peace excuse me from serving?

*Mr. Linder.* No?

*Mr. Cowles.* Has not a justice of the peace a right, by common law, to act as coroner, so is he not incompetent?

The COURT. That is a personal privilege which the individual may or may not claim.

*Mr. Linder.* Have you been commissioned as a Justice of the Peace. *The Juror.* No.

The COURT. Mr. Botkin will be sworn as a juror.

*Mr. Murdock.* So much of the time of the Court has been occupied in the trial growing out of the same tragedy, for a participation in which these individuals have been indicted, and so much of your own time has been consumed in the preliminary steps of this trial, that I am warned to be as brief as possible. It is unnecessary to tell you that these individuals are indicted for a riot; that the Grand Jurors have found that these individuals, with divers others, assembled on the night of the 7th of November last, with a determination to attack the storehouse of Godfrey & Gilman, and of breaking up and destroying a printing press stored therein.

For the purpose of sustaining the indictment, gentlemen of the jury, it is necessary that the Government should show that two or more persons assembled, for an unlawful purpose; that they entered the storehouse of Godfrey & Gilman, with force and violence, and that they broke up and destroyed the printing press, then and there found, as is charged in the indictment. It is necessary that the People should show that Godfrey & Gilman were in the possession of the property destroyed. They need not have been the actual owners of the property; it is sufficient if they were in the possession of the property, at the time it was broken up and destroyed. If they had a special property, as, for instance, if they were bailers of the property, it is enough.

The indictment is framed under the 117th section of the Criminal Code, and charges the defendants with having committed a riot.

*Mr. Linder.* This case, gentlemen, is the last trial, the closing scene in the comic tragedy which has been played off in your city. You are to determine the guilt or innocence of the individuals now on trial, by the law and the evidence which shall be given you, and you will have to believe three things before you can find these defendants guilty: first, that two or more entered the storehouse with force and violence, because that is the charge contained in the indictment: and here let me say to you, that you are the judges both of the law and the fact; the Government are bound to satisfy you of the truth of every allegation they have charged against my clients: they are bound to satisfy you that certain facts existed; that these persons entered the storehouse of Godfrey & Gilman with force and violence; that they unlawfully, riotously, and with force and violence, broke and destroyed the press; and that that press was the property of the individuals whom they have alleged were the owners of it. Here is the section under which the indictment is framed: "If two or more persons actually do an unlawful act, with force or violence, against the person or property of another," etc. Now the prosecutors are bound to prove all their allegations; they are bound to prove that the building was the property of Gilman & Godfrey; that the press was the property, the bona fide property, of Gilman & Godfrey; that two or more persons, unlawfully and with force and violence, entered the building; that when they had so entered, they broke up and destroyed the press, with force and violence; and, further, that they had no right to do so; and if they fail in proving, in satisfying you of the truth of any one of these allegations, you will be bound to return a verdict of not guilty.

#### THE WITNESSES FOR THE PEOPLE.

*Mr. Broughton.* Know nothing of what took place on the night of 7th November; was not present at the riot; have had conversation with some of the defendants in regard to the riot; every

body was talking about it; have heard it spoken of by a great many individuals; was on the ground after the battle was fought; did not see the press broke up; saw a part of it next morning; no persons ever told me that they broke it up, and I never made but little inquiry about it. No proposition was ever made to me that I should be the captain of the mob. There was a great crowd, when I got to the warehouse, that night; don't know that I saw any of the defendants in it. I went into the warehouse to look at the corpse.

*Henry W. West.* On the afternoon of 7th was standing at the store door and saw John Solomon come along the street—an hour and a half before the mob. Solomon stopped and told me that a mob was gathering; that preparations were making to burn or blow up the warehouse, unless the press was given up; said Gilman had been a friend to him and he did not want to see him or his property injured and asked me to go and tell Mr. Gilman what was going to be done; I went up to my counting room, found Mr. Keating, and in company with him went up to see Gilman. I told him what Solomon had told me; later came into the street and saw squads of men gathering, principally in and before the coffee houses; don't know that I recognized any of the defendants at that time in the street; started to the warehouse again, and met Dr. Horace Beal; asked him if he would not use his influence to induce the mob to desist and disperse; he replied he could have no influence with them and would do nothing about it; went into the warehouse; had been there but a lit-

tle while before the mob came; they came on the side of the store next the river; knew only one of them; started to find the Mayor, Mr. Krum; met him on the street, talking to a crowd of people. Among the crowd I saw Rock and Bruchy; saw Morgan some where at that time; do not recollect exactly where; saw Nutter early in the evening; heard him say he was sorry to do anything criminal; an arrangement was made that Mr. Krum was to go into the warehouse and let them know what the mob wanted; went into the warehouse again with Krum and Mr. Robbins: we came out soon and Mr. Krum addressed the crowd that was collected. At that time saw Rock and Beal in the crowd; soon saw the fire applied to the building and ran down to put it out; started to go up the ladder but desisted as I found guns were aimed at me, and saw them flash. At the time I ran down, saw Rock; he was standing near the ladder; saw another man standing about there at the same time; it was Palmer; he had no gun then; saw Frederick Bruchy there at that time; he was swearing a good deal; went up and stood at the corner of the penitentiary wall; saw Beal there; he had a gun. It was soon said that the people inside would give up; went up the river a little way, thinking that would be the best direction for them to run when they left the building. Some one called out to me and told me to "stand" or they would shoot; turned round—saw Gilman and the others at the door, and asked them to wait a few minutes; turned and assured the crowd that Lovejoy was dead, and told Mr. Gilman and others to run



then; they did so; I went round the building and up the ladder to put out the fire on the roof of the building, and called to them below to help put out the fire. Dr. Beal went down to the river and came back and said he could find nothing to bring any water in; took off my hat and threw it down to them. Dr. Hope picked it up, filled it with water, brought it to me, and I put out the fire; came down the ladder and went into the warehouse; saw Lovejoy laying there; went up into the garret; saw Gerry (one of those who had been in the warehouse), and secreted him; watched for an opportunity; took him down stairs with me, saw the way was clear and told him to run; he did so; saw Beal again then, and Jacob Smith; recognized Butler's voice; saw Palmer too, I think. About the time the fire was set to the buildings he was near the ladder; don't think I saw Solomon; went into the warehouse with the crowd before the press was thrown out; saw some one breaking up the press; I don't know who; did not notice as I was anxious about Gerry; I made some remark to divert the attention of the mob from him, and told him to run; don't think I saw Palmer on the ground; I saw him early in the evening in the coffee house—he was talking loud, but I don't know what he said; when I saw Beal he had a gun, and was standing next the penitentiary wall

I was the first who went into the warehouse after Gilman and the others left it; saw Rock at the foot of the stairs; saw Dr. Beal up stairs; we went towards where Lovejoy laid; saw a good many of our citizens in the warehouse soon afterwards; saw Rock

and Beal there early, before the press was thrown out of the house. Dr. Beal went with me into the counting room; Beal had no arms by him at that time; When I saw Rock at the time the fire was set to the warehouse, he was standing some distance this side of the ladder—he had a gun. Dr. James Jennings had a gun; saw Solomon Morgan some time during the evening, on the street—he seemed crazy—was rallying the boys as he called them—he had no gun; did not see the commencement of the attack upon the warehouse; was in the building at that time.

The guns were first fired by those outside; the windows were all broken while I was in the building; at the time I was conversing with Mr. Gilman, I was a good deal exposed by the attack made from without.

The mob poured into the warehouse soon after Mr. Gilman and the rest left it—soon after the fire was put out; went into the warehouse on the front side, and don't know how the mob got in; went in because I was anxious that no property should be injured or destroyed; there were a good many candles burning about in the store, and I thought there was danger of injury to the property; recognized Morgan encouraging the boys; he said, go and finish your work; saw both Beal and Rock inside the warehouse before the press was thrown out—as soon as it was found, I left and went down stairs—they were moving it when I turned away; don't know who the persons were who moved it; did not hear Beal call the boys to rally after the press was destroyed; did not hear any thing said about preventing any



arrest; when John Solomon told me that preparations were making to burn or blow up the warehouse, if the press could not be got without, I do not recollect whether he used the word we or they. Godfrey & Gilman were in the occupancy and possession of the building; the press was in the warehouse; Solomon appeared to be anxious about the safety of Mr. Gilman; said he had been a friend to him.

*Cross-examined.* The warehouse is built of stone, was occupied by Godfrey & Gilman for selling goods; their house is a commission and storage and forwarding house.

*John M. Krum.* On 7th November last went to the spot with Mr. Robbins; first met those who were carrying Bishop to Dr. Harts' office; Bruchy, Solomon, Morgan, Butler, Carr, Palmer, were among them; inquired of them if any one was hurt; was told some one of our or their company was shot; asked if he was hurt badly; was told they thought not; endeavored to persuade them to disperse; Carr, Palmer, and Morgan conversed with me; soon Bruchy came up again and some others I did not know. All seemed a good deal excited; asked them what they wanted; Carr said that all they wanted was the press; that they did not want to injure any one or any one's property, but that they wanted the press and would have it; used all the means in my power to induce them to disperse; told them of the penalties and liabilities they were incurring; quite a crowd had gathered round me by this time.

Some one, I don't know who, proposed, and Carr repeated the proposition, that I should go in-

to the warehouse and let the people who were inside know what they wanted; think Palmer urged the proposition; saw Dr. Beal that evening standing before me when I addressed the crowd after I came out of the warehouse; next saw Dr. Beal in State street; he had a gun by his side at that time; the press was broken up when I got to the warehouse; saw Solomon Morgan at that time; saw Mr. Nutter; he keeps a livery stable in Upper Alton; saw Bruchy; there was such a crowd and the candle light struck me in such a direction that it partially blinded me; could not see faces distinctly. When I saw the men I have mentioned, I stood by the side of Mr. Greeley; noticed Solomon Morgan; he was making a good deal of noise; Bruchy and Beal were there, standing near; they were doing nothing; don't think I saw Rock at the south end of the building (side where the press was broken) at all; did see him that night; the first time was when Bishop was carried to Dr. Hart's office; he had a gun in his hand at the time.

When I saw Dr. Beal, when they were breaking up the press, he made a remark like this, Now boys we must stick together; and if any one is arrested we must come to the rescue. This was when the press was broken up and nearly all thrown into the river; don't recollect I saw Carr at that time; was standing at the corner of State street, near Marsh's store at the time the warehouse was entered. After I went into the building saw Drs. Beal and Jennings in the building; these are the only ones of the defendants I recollect to have seen in the building: at the time

I commanded the crowd to disperse, Solomon and Palmer stood near me; don't recollect that I saw Smith at all. Butler I saw in Second street when I first went along; did not see him again that night. He had a gun at that time. When Dr. Beal said, Now boys, we must stick together, etc., Bruchy stood in front of him, and I think Butler also, although I am not positive about Butler; at the time Dr. Beal made the remark, there were but two or three persons very near him; Beal had a gun in his hand at the time; while standing there I was several times crowded off the box I was standing on. I heard no guns fired while I stood there. Hammers were flying pretty busily, and it was somewhat dangerous standing there.

*Cross-examined.* Am not positive whether Dr. Beal said, Now boys "we" must stick, or "you" must stick together, etc. I think he used the word we; saw Bruchy and Morgan use the hammer in breaking up the press; saw Nutter throw pieces into the river; the press had been thrown out before I got to the building; Lovejoy had been killed when Beal made the remark I have repeated; heard the crowd say all they wanted was the press; I should think there were 200 people in State and Second streets; don't know who the press belonged to; heard Lovejoy speak of the press but I don't know whether he said anything about the ownership of it.

*Winthrop S. Gilman* (called by defendants). The press was destroyed on the night of 7th November last, was received by us on storage at the request of Mr. Roff. It was not owned by us.

To *Mr. Murdock*. The press

was in the possession of Benjamin Godfrey and Winthrop S. Gilman; did not know how the last press came to be sent, nor who sent it; Godfrey & Gilman own the store; it has been built since 1833 or 1834. We have a deed to it.

*Mr. Linder* objects to evidence of this kind as to the ownership of the building: Title deeds are the best evidence of property, let them be produced. Objection sustained.

*Mr. Gilman.* Was one of those who were in the building on the night of the riot. We were forced to leave the building by the mob: the first attack was made by stones, which were thrown against the building; a gun and a pistol were then fired by those on the outside; there was firing then from both parties; after this there was a short intermission; firing soon was again resorted to, and in a little while the fire was put to the roof of the store; Mr. West gave us this information; we soon left to prevent its being burnt up; the press was in a box; there was a cast-iron roller, however, which composed a part of it, that was not in a box; the boxes which were taken out of the store, and which contained the press that was destroyed, were the same that were received on the 6th November, when Mr. Krum was present; don't know that I recognized any one of the mob, unless it was Carr. When the mob first came up to the building and I had addressed them, think it was Carr who answered me; he said they would have the press at the risk of their lives; saw no one else whom I recognized; we left the building, persuaded that our lives would have been sacrificed

if we had remained. The building was occupied by Godfrey, Gilman & Co., Mr. Benjamin Godfrey and myself. After we left the store several guns were fired at us; no one was wounded that I know of. None of the shot

took effect upon my clothes; understood that they did upon some of the others; these guns were fired by the mob outside.

*Mr. Cowles.* If you receive goods for storage, are you or are you not liable?

*Mr. Linder.* You need not answer the question, witness. I regret your honor, that I feel called upon by a sense of duty to interpose objections so often, to the different questions which are propounded by the Counsel for the People. It is a matter of regret to me, and I fear that I may fall under the displeasure of the Court by so doing. But I cannot sit still and permit questions to be asked of the witness, so plainly, so positively, and so absolutely improper as this. When the witness is asked whether he is not liable for the loss of goods in his hands on storage, what is it but asking the witness to be a judge. The question of liability is a pure question of law; one which the witness is presumed not to know; which he is to be presumed to be incompetent to decide, and one which, whether he knows or not, he will not, I trust, be permitted to answer. If witnesses are to be allowed to testify as to points of law, why do you sit on that bench?—or why has our statute declared that the jury shall be the judges of both law and fact? If there has been any contract of responsibility entered into, by which this witness is liable for this property, let the witness be inquired of concerning such contract; let him give us the facts of the case, and we will take care of the law.

But suppose he is responsible: does that fact make him the owner of the press? does that fact vest the property in him? It puts a special property in him I admit, but I wish to lay down the doctrine here, as I shall lay it down, by and by, to the jury; that it is not sufficient to sustain the allegation in this indictment, that Godfrey & Gilman should have had a bare special property in this press. When a man is indicted for stealing property, it is not competent, it is not sufficient to prove a special property barely, in the individual whose property is alleged to have been stolen.

The property must be proved to belong to him, in whom it is alleged to have been, at the time it was stolen. It is useless to travel back to the "Form Books," to prove the truth of this doctrine. Our statute lays down the law—prescribes the rules—and it is there positively and expressly declared that the property must be alleged and proved to be the property of another individual.

I care not what the English law says, when our statute declares that the property must belong to another individual.

And now an attempt is made to show a special property in the men in whom the actual, the general property is laid! How are statutes to be construed? how is the criminal code to be construed? Is it to be done in such a way as, if possible, to make it reach a man? in such a way as to make it cover a case? is it to be stretched? is it to be strained till it fits? If so, America, like England, may boast of having a Jeffreys.

But our code is by itself; it has no reference to common law; it is a code of enacted offenses. Crimes under our laws are specially defined. Certain acts, or certain acts done in a particular manner, have been laid down as criminal; and where, as in our state, statutes define what shall, or what shall not constitute crime, the common law definition is dispensed with. When statutes have altered an offense, enlarged or limited the boundary of crime, it is for the Court to give such construction to those statutes as it may deem proper: it is for the Court to say whether it will give such a broad construction to the statute as will cover this case. What the statute means when it speaks of persons, it means when it speaks of property. When it speaks of persons, it means natural persons; and so when it speaks of property, it means general property: when it speaks of ownership, it means general ownership. This witness proves that the press was not owned by Godfrey & Gilman, that they had no property in it. Is not that falsifying the indictment? that alleges that the press was the property of Godfrey & Gilman; this man disproves it.

Suppose these individuals were indicted for having destroyed this press, the prosecution alleging it to be the property of Lovejoy? would an acquittal, under such an indictment, bar another one which should charge the property in the actual owner? If the Court should so construe the statute as to refine and whittle away the law, I put confidence in the jury; I know an honest jury will always rally to the rescue.

The COURT. It is unnecessary, Mr. Cowles, for you to proceed. The Court is called upon to put a construction upon the statute. If examined, it will be seen that our lawgivers did not intend to modify any general principles of the common law. Our science of jurisprudence is derived from the English common law.

The Court will hazard the general remark, that no decision can be found where, in ordinary cases, although it is necessary that property in some one should be charged and proven, any distinction is made between a general and special property. I defy gentlemen to produce such an authority. What the statute intends when it speaks of property, is simply that the property alleged to have been destroyed should be charged as the property of another, which may be either a general or special property.

The jury are the judges of the law and the fact; and if the persons in whom the property is laid have either a general or special property, it is sufficient for the jury to consider whether the law arising on such facts is sufficient to satisfy the allegation in the indictment as to ownership. The objection is therefore overruled.

*Mr. Gilman.* When we receive property on storage we consider ourselves responsible to the owner for any loss or damage while it is in our hands. We had a case a short time ago where we had to pay the damage which the property sustained while in our

possession; have been engaged somewhat extensively as forwarding merchants. We now turn over such business to another house, although we do receive and forward some goods for some few friends. When the press was sent for, the one that

was taken from Gerry & Weller's store, and destroyed, I had an interest in it, to the amount of \$100. The press was destroyed, but not the types, and this last press came on to supply the place of that one.

*Mr. Linder.* Who contributed to that first press? Deacon Long of Upper Alton, and I think a number of gentlemen at Quincy, but I don't know who they were. I subscribed first, I think, and I believe I did not see the paper after I set my name down. Did Mr. Godfrey subscribe anything towards that press? He did not.

*Sherman W. Robbins.* My testimony would corroborate that of Mr. Krum's up to the time he addressed the crowd; soon after that we parted; went into the warehouse at the time Mr. West went in; only went into the cellar room; recognized but one of the defendants in the building—Rock; did not go up stairs; was satisfied they would do no injury to any of the property in the building, except the press, and turned round and came out; understood the object the mob had was to obtain the press; understood this from Carr, Palmer and Bruchy; they said they would have the press at all hazards; understood from the mob they would have the press if they had to burn the building to get it.

*Mr. Cowles.* State if you commanded Carr and Palmer to disperse, and if so, state whether any resistance was made, and by whom.

Objection raised by *Counsel* for defendants, because the individual has been already tried and acquitted for the offense.

The COURT. The fact is proper

to go to the jury as showing the intention of the parties.

*Mr. Robbins.* Don't know I saw Palmer after the fire was kindled, in the street did see him before and desired him to go home. Palmer took hold of me and said, I must, or I had better go away, that he did not want to injure me; but he said the press would be had at all events; can't swear whether he said he or they would have it; but he did use one or the other of the expressions; saw Solomon early on the ground, in Short street; he took no part as I saw; he was running about; don't know that I heard him say any thing till I heard him say he was wounded; saw Morgan all about; he was crazy or drunk; thought he could not have superintended anything; he made a great noise; saw Dr. Beal when the press was first thrown down; he had no arms as I recollect; saw Jennings; he had a gun: it is reported that he has gone to parts unknown. I did not see Jacob Smith nor Butler to recognize them; saw Carr when I first went up to the place and afterwards two or three times; he requested me to go in the warehouse and see if the people there would give up the press; understood from him that they had determined to have the press; don't know that I saw him after that time; I recognized Rock but once and that was when I went into the building after the press was given up. The press was pitched out from the upper story on the ground; it fell on a stone I think; don't know who broke up the press; when I left no blow had been struck upon it. When I left I went into the counting room and stayed till morning; I think the

people inside were compelled to leave; if they had remained they would have been burned up; know of their having been shot at as they were leaving the building, only from report.

*Cross-examined.* When I met Palmer he was doing nothing; saw him three or four times between the time Bishop was shot and the time the building was fired; he was doing nothing; he was anxious I should go into the warehouse and see if the press could not be given up; he appeared anxious that nothing should be injured unless it was the press; he said the building would be destroyed if the press was not given up; he wished me to go in and see if I could not persuade them to give up the press; he seemed to think that if it could be given up it would save burning the building; don't know who threw the press out nor who broke it up; don't know whether Rock was where the press was or not; I saw him on the floor of the first story; I can't say whether he went farther up or not.

*Samuel L. Miller.* On the night of 7th November, shortly after sunset I noticed people gathering in Second street; saw John Solomon; he told me that they were about to attack the warehouse and break up the press—that if they could not get it by fair means, he was afraid they would have it by foul means. He said he should be sorry—that Mr. Gilman was a friend of his—that he did not want to see him injured—that Mr. G. had helped him a good deal, etc.; went immediately to the Mayor, and communicated to him what I had heard. He said he could not believe it, but asked me to remain

in town and be ready in case the disturbance should take place; about 10 o'clock saw the crowd collected and followed them up to the warehouse; did not see Solomon among them; when the mob was addressed by Mr. Gilman, some one replied to him, think it was Carr; Gilman stated to them that he was sorry they had come at such an unusual hour to create a disturbance—that he felt it his duty to defend his property—that he should do so and should do so at the risk of life. The reply was: We don't come to injure you or your property—but as you say you will defend your property at the risk of life, so we say we will have the press at the risk of our lives. There were a good many round in every direction; can't identify any whom I saw except Butler, Carr, and Rock; went into the warehouse with the crowd. West and Robbins went in about the same time—after a little time I saw the house full of people; saw Palmer in the warehouse about fifteen minutes after I went in. I did not see the press thrown out; heard it fall; saw part of it next morning; saw Dr. Beal around the building on the Levee on the back side of the building. He was forbidding the boys touching some arms standing there; I was there as a peace officer; had no orders to be there; repeatedly commanded the crowd to disperse; was not present when the ladder was raised to the building; at that time was guarding the door to Dr. Hart's office to keep the crowd from rushing up there where Bishop was; saw Gilman and the others run across the foot of State street; heard guns fired at that time; did not see where they were fired; did



not see Nutter till all was over; saw Rock and Beal, but can't say what any one was doing; stones were thrown by the crowd at first; saw some people throwing stones who were not indicted; but none of those who are indicted.

*Cross-examined.* When Gilman and others ran across State street they ran quite fast. Some one of them fell down. They had no arms at the time. Beal forbid the boys taking anything away. He said he did not want any property injured, nor anything taken away. I saw Palmer but twice, once with the Mayor and Mr. Robbins, and again after the affray was over. Palmer asked Weller (one of those inside, and who had been wounded) how he felt. When I saw him he was not disorderly; saw no one in the warehouse who was disorderly; there was not much riot by the crowd in entering the building. Mr. West led the crowd in. Shortly before the building was fired saw there several of those indicted. I don't know who first said Fire the building. Don't know who brought the fire. I saw a man go up the ladder can't swear positively who it was; heard a gun—then a cry of fire the building; don't know who cried out to fire the building; did not see Carr; saw Dr. Beal; he had arms by his side; saw Rock; he had on different clothes than I ever saw him wear before or since; I saw Beal inside, and Rock and Palmer about the building somewhere. I saw Solomon that evening, opposite Marsh's building, in the street. He told me he had three shot, and I think he said in his back. Butler I don't recollect, nor Bruchy; did not see the

press thrown out; did not recognize Carr, nor Beal, nor Butler, nor Morgan, nor Nutter among the crowd; did not see the press broken up nor thrown into the river.

*Cross-examined.* There were a great many people in the building; should think fifty people; there were a good many people there who had not been engaged in the crowd; saw Judge Martin in the second story of the building.

*Joseph Greeley.* Did not see Solomon nor Palmer; don't know Morgan; saw Dr. Beal; I don't know whether he had a gun or not; I saw Jennings, he had a gun on his shoulder; saw Nutter when the press was broken up; Butler I saw in the early part of the evening at the Tontine Coffee House; he was excited, was swearing about Abolition and the press; he said he would have the press any how; did not see Carr nor Rock; Bruchy I saw when the press was broken up. After the fire was put out I went down to the bank of the river; when I got there Bruchy was staving up the press. Some one said, Fred, you have done enough; I went up into the counting room. Mr. Lovejoy lay there dead; don't know that I heard Dr. Beal speak during the evening; at the time they were breaking up the press I saw Dr. Beal looking on, but I did not hear him say anything.

*Cross-examined.* Mr. Krum stood by my side a part of the time while they were breaking up the press. I spoke to him. I don't know which of us left first.

*Samuel Avis.* Was not there till the bells rung; recognized a number of people; did not see



Solomon nor Morgan; did see Dr. Beal and Palmer; did not see Nutter; saw Jennings with a gun; Jacob Smith I don't know, nor Bruchy, nor Butler; saw Carr; thought I saw Rock; saw a man whom I took to be Rock, although he was differently dressed than Rock usually is. Dr. Beal was armed, was exulting, said he would kill, or would like to kill every damned abolitionist in town; he did not say he had killed any; thought he said it in joke; was not afraid of him, although he said I was an abolitionist; saw no one engaged in breaking up the press; the crowd was so great I could not get near enough to see who was busy; saw none of those who are indicted enter the building, or have any share in breaking up the press.

*Edmund Beal.* On the night of 7th November, John Solomon was the first man I saw on the dock, and soon afterwards Butler; think about the time Bishop was shot, heard the voices of different persons, some cried, there goes an abolitionist broke out of the house; some said shoot him, some stone him, some throw him into the river; saw somebody pick up a stone at the time. Solomon came along up where I was standing; that is all I know of him; didn't know Morgan, nor Beal, nor Nutter; saw Smith; he appeared to be quite cool; he exhorted the boys not to be intimidated because Bishop was shot; told them they had better go up and make a finish of it; Butler I did not know; Carr I did not see; James M. Rock, that is the man I did see; saw him with twenty or thirty persons when they were marching up to the warehouse; Rock came to me and

asked what I wanted; told him I came after my boy; he pointed him out to me and told me to take him and be off; said I had better go home, and I did so, according to his orders; I soon returned; came down and stood near the post at Mr. Marsh's store; saw the flash of the gun when Bishop was shot; they brought him up by where I stood to the doctor's office; soon after that I saw Rock pass by with a ball, or bunch of fire in his hand, swearing that he would burn down the building and all in it; don't recollect of seeing any others of the defendants; I don't recollect seeing Frederick Bruchy.

*Cross-examined.* It was between 11 and 12 when I saw Rock pass by with the fire, I think; I saw no one else carrying fire; saw fire kindled in the street soon after Rock carried it by, and soon after that I saw a ladder raised to the building. It was perhaps 20 minutes after Rock passed with the fire before I saw fire put to the building; was a good deal concerned about the matter and watched the man who had the fire pretty closely; had as much anxiety as any good citizen would have had, I think.

*John H. Watson.* Only saw two of the persons indicted, John Solomon and James M. Rock; saw Rock at the corner, near Dr. Marsh's store, and Solomon in Dr. Hart's office; Solomon came in and said he was shot; upon examination, one or two shots were found in him; in his arm, I think; as I came down from the doctor's office I saw Rock; he was doing nothing.

*Webb C. Quigley.* On the night of 7th November last I went in-

to the Tontine. There were a number there; they went out into the street, formed a line, and marched up to Mr. Gilman's warehouse; followed and went into one of the unfinished buildings; the mob drew up on the side next the river; Gilman addressed them; some one replied to him; supposed from the voice it was Carr; the mob soon started to go up to the corner of the penitentiary wall; some one cried out, there goes an abolitionist; some one cried out shoot him, some, throw him into the river, some, stone him. Morgan run up to me and swore if I did not fall into the ranks he would kill me. Bruchy came up, made some remarks, and they passed on. Beal came up to the penitentiary wall where I was, and stayed there a little while; he had no gun with him; saw Rock coming down the hill in State street with Dr. Jennings; he had a keg in his arms; looked about the size of a keg of gunpowder; saw Morgan; he was running from home in his shirt sleeves and bare-footed; told some one after his gun. The Mayor stopped him; Morgan asked the Mayor how he would like to have a damned nigger going home with his daughter; the Mayor said, not very well. At last he said, well, Morgan, all I have to say is, don't let them hurt you; went up to the penitentiary wall; was at the corner of the wall when Bishop was shot. Dr. Beal went down and came back, and said he thought he was not hurt much; was there when the press was thrown out; saw a man beating upon it; could not see his face; from the dress and size, took it

to be Nutter; he had a great coat on. The people, when they left the Tontine, formed in line; did not see Solomon, nor Beal, nor Jennings there; I did not notice Palmer; they were ranged round the walls in the Tontine; Carr was carrying round liquor to them; saw Butler, Rock, and Bruchy there; did not hear them say what they were going to do; did not see Carr that I know of, after the mob left the Tontine; was standing at the corner of the penitentiary wall when Bishop was shot; went into the warehouse; saw none of the defendants in there, that I recollect; when I was in the warehouse Smith came down and cried out, Solomon, where have you been? I have been up there and thrown some stones. He, Smith, told how many stones he had thrown, but I don't recollect the number; I don't know what reply Solomon made; Morgan was drunk at the time I saw him.

*Solomon Woolters.* Was in the city on the night of the 7th, but not at the warehouse; was sleeping soundly at home when the tragedy took place; know of no previous preparations having been made; expect the boys were afraid to let me know any thing about their arrangements. I went through Second street between nine and ten o'clock that evening; I saw no one passing, and there were but three lights burning in the whole square; expected likely something was brewing and came down to see if there were any preparations for the attack, or any interruption in the peace likely to take place; went home believing no attack would be made that night.

## THE WITNESSES FOR THE DEFENSE.

*Seth T. Sawyer.* The Mayor called upon me that night; informed me of the disturbance, requested me to go and get Judge Martin; when I came back and got on the ground Bishop had been shot and a great many people had collected; I was there near the Mayor when he received the shot; we both took to our legs; came into Second street; there I saw Nutter, and was with him a long while. I saw some persons carry a ladder along, but I don't know who they were; saw the man pass with the fire in his hand; don't know who it was; don't know whether it was Rock or not; saw the ladder raised to the building; Nutter had been with me all this while; came away about that time; was not there when the mob broke into the house, nor when the press was broken up; Nutter did not appear to take any active part while I saw him.

*Cross-examined.* I saw, I should think, 150 people when I first got on to the ground; recognized Solomon, Morgan, Beal. I saw Beal when the Mayor made his address to the crowd; at that time he stood nearly opposite the Mayor; saw Solomon in Dr. Hart's office. He had some shot in his right side; they were in his right leg, arm and side, I think; he was tolerably well peppered; the shot were only skin deep.

*Alexander Botkin* (a juror). Saw a man carrying fire through the street. He passed near the post at the corner of Marsh's store. It was a short time after Bishop was shot. The last time I saw the fire was when it was

kindling in the street. I know the man who carried the fire. I know him well. It was not Rock.

*Cross-examined.* Had no conversation with Rock, nor with anyone in particular; at one time I saw Smith, and I had a conversation with him; exchanged a few words only; the person whom I saw carry fire was about Mr. Linder's size (though it was not him); he was thinner and more stoop shouldered than Rock; did not see the building fired; knew afterwards that preparations were made to burn or blow up the building if it was necessary to do so, to get the press; did not see the ladder carried along; the man who carried the fire along, as he went down the street was running; I asked him where he was going; he said it was none of my business; as he came back with the fire he was coaxing it; it was not a large bunch or ball of fire.

*Judge William Martin.* I did not arrive at the scene of action until late; saw the person go up the ladder and put fire to the house; didn't know who the individual was; the distance was so great from where I stood that I could not recognize the person; the ladder was rather short, and think the man who went up the ladder had to reach up over the end to put the fire on the building; saw Rock but twice that night; in Dr. Hart's office and on the corner of State and Second streets; he had a gun, and was in an altercation with young Prichard concerning abolitionism; I interposed and stopped it; next saw Rock running down

State street with a gun in one hand and a large bucket in the other, which he professed to have procured for the purpose of putting out the fire; saw some one with fire in his hand; saw a person going through State street with fire; it was not a large ball of fire; the man who had it was going deliberately; he walked in the center of the street; did not observe him particularly till he had got to the west line of State street; there were 100 people standing as spectators, all, or most of whom being owners of property, had a deep interest in the preservation of good order; applied to many people to aid me, but found no one who was willing to assist in the suppression of the mob; did not use my authority as a peace officer because I was satisfied it would do no good; saw Solomon that night but did not see him doing anything; he was standing, when he was shot, somewhere near the penitentiary wall; Mr. Krum and myself were together part of the evening, though I did not hear the Mayor's address; saw Solomon a moment, who told me that he had been shot; went no nearer the scene of riot than the north side of Second street; the fire was communicated to the roof of the building on the end farthest from the river; saw Palmer, but none of the others named in the indictment except as before stated; it was dangerous to have gone very near the assailants; at one time I asked Smith, one of the defendants, if something could not be done to suppress the riot and Smith replied that he would help if any one else would; I saw Beal—passed him and spoke to him—but what was said do not recollect.

*Mr. Shemwell.* I saw Nutter the evening of the 7th. Was with him in a private house in the city when the riot commenced; we went out when we heard the noise; the crowd had marched up to the building then; was with Nutter during that night; saw him make no attempt to do anything I thought wrong; we were on Water street when the press was thrown out of the building; Nutter said then, Let us go home. We went in to see Lovejoy; was with Nutter all the evening, and could have seen him if he had done any thing. Nutter picked up a piece of the press after it had been broken up and said it would make a good thing for painters to rub paints on, or with, and he dropped it again on the ground. Nutter had on a blanket coat.

*Cross-examined.* Did not know any one who was engaged in breaking up the press; left soon after the press was broken; Nutter and myself were together all night; don't know whether Nutter threw the piece of the press which he picked up into the river or not; I did not see him throw any stones at the building; he had no gun; Nutter and myself came down that evening from the upper town after we had our supper; had business in the city to do; asked Nutter if he would come down; he said he had heard that the press had arrived and asked if I supposed it would be broken up that evening; told him I thought not; live in Upper Alton; did not hear that there was to be any row; heard the press had arrived; don't know of any one's coming up to our village to let us know that the press had come; was not invited to come down and assist in break-

ing it up; I don't know why he inquired; heard of no preparations going on to break it up; Nutter asked me if the press had come and if there was going to be a mob that night; don't know what Mr. Nutter's intentions were in coming down that evening; I know he had no hand in breaking up the press.

MR. MURDOCK, FOR THE PEOPLE.

*Mr. Murdock.* I shall not occupy much of your time, gentlemen of the jury, in opening this case to you, on the part of the prosecution, but shall leave the burthen of the argument to my able associate, who will conclude. Indeed there is but little room for argument. The indictment in all its parts is fully and clearly proved; and if it were not for the lawless spirit which has long pervaded our land and swept over and desolated our city and rested here; if I did not feel that it was my duty to impress upon your minds the necessity of vindicating the law in its majesty, I would say less. The offense charged on the defendants and so fully proved is one that strikes at the existence of social peace and security, and tears away the barriers which the law has thrown around the citizen, his life and property. It aims at government itself, for a time prostrates its power, and rears up anarchy to run lawless over our dearest privileges. What is government worth unless it affords protection to property? What are laws worth unless they bring punishment upon the head of offenders? What are governments and laws worth unless the jurors of the country give full efficacy to their provisions? Is government valuable? Shall the laws which the people, through the proper authority, have passed, intended for the protection of the citizen, and the punishment of offenders, be of any practical operation? It is for you to say, for through you only can they be made operative. If the facts of any offense present a case deserving of punishment, then do these call upon you most imperatively for a verdict of guilty. Gentlemen, reflect upon the terrible malignity of the facts disclosed. The defendants assemble on the night charged in the indictment, for the purpose of committing an act long deliberately formed, enter one of the groceries (those sinks of cor-

ruption which so much disgrace our city), then range themselves in order around the walls of the house, drink down a glass of maddening alcohol, and from thence, infuriated, proceed to the storehouse of Godfrey & Gilman, with design of forcibly entering it, and destroying a printing press, and complete their purpose. Gentlemen, shall the perpetrators of an act so lawless, so diabolical, go unpunished? Shall they be permitted to live among us unbranded by a verdict of guilty? Shall it be said that you permitted such an outrage, scarcely denied, to go unredressed? Shall it go forth to the world that property is unsafe in Alton; that law is powerless; that juries are the shields of crime? I will not, gentlemen, suffer myself to believe that you will permit your prejudices to influence your verdict. You will regard the solemn oath you have taken. What has the private opinion of any individual to do with the question of guilt or innocence? What has the exciting subject of abolition to do with the issue formed between the people and the defendants? Are the defendants guilty as charged? is the only question you are sworn to try.

But, gentlemen, anti-slavery with all its horrors will be glowingly portrayed. You will be told that a verdict of guilty will be an approval of its principles, and the triumph of a party whose object is to sever the Union, to rob our citizens of their property, to excite the slave to murder his master, wife and children, and to plunge our common country into the horrors of an exterminating civil war. I have too much respect for you, gentlemen, to believe that you will be driven from the line of your duty by such considerations. If there is one privilege more dear to us than another, it is the right of free discussion; the liberty of the press; the freedom of conscience. These have civilized and elevated a world; and better, far better, that all the evils which it is predicted abolition will bring on the country, should be actually fulfilled, than that these dearest rights of freemen should be surrendered, and the Constitution of your country, bought with the blood of freemen, and sanctified by the memory of our fathers, should be nugatory. Then, indeed, will we be slaves.



Yes, gentlemen, the liberty of the press is inseparably connected with our freedom, and the day that high prerogative of a free people is given up will be the birthday of a nation of slaves.

Gentlemen, in this offense, there are no accessories, all are principals. The act of one is the act of all who participated in the commission of the common design. I leave the case with you, confiding in the ability of my friend, Mr. Cowles, to strip it of the difficulties and doubt the ingenious counsel for the defense will endeavor to cloud it with.

MR. HALL, FOR THE DEFENSE.

*Mr. Hall.* In the few remarks which I shall make to you, gentlemen, I shall aim to be as brief as possible. I appear before you as the counsel for Josiah Nutter solely. I appear before you, no less from a conviction that he is unjustly charged of being concerned in the commission of this offense (a conviction which is forced upon me by my whole acquaintance with him) than from a feeling of entire satisfaction that the evidence is not such as to warrant you in returning against him a verdict of guilty. The indictment charges my client, jointly with others, with having on the night of the 7th of November last, with force and arms, entered the storehouse of Godfrey & Gilman, and with force and violence broke and destroyed a printing press, then and there found, and being the property of the said Godfrey & Gilman. The question presented for your consideration here is a bare question of fact. Did Nutter enter? Did he break up, or was he concerned in destroying, the press? Gentlemen, you hear nothing of Nutter till the press was thrown out from the building, as having been concerned in any acts of violence. No one sees him; none of the civil officers, who, if they were unable to suppress the mob, were at least active in discovering the leaders of it, swears to his presence on the ground; none of the whole array of witnesses drawn here by the people testify to any act of violence done by his hand. He was not seen in the streets; he was not in the coffee houses; he was not rec-



ognized as having been engaged in the attack upon the building—and it was not till the affray was over, till hundreds of your citizens were also attracted to the spot where the act of violence was committed, that he was discovered among the crowd. But other individuals were called, by whom we are enabled to prove to you where he was, and the sort of feeling he had in relation to this matter.

Mr. Sawyer says that he was with him a good part of that evening; and that in conversation with him Nutter expressed his disapprobation of the proceedings of the mob.

Fortunately, however, gentlemen, we have been enabled to show you by one witness how this individual spent that evening. Mr. Shemwell says that he came from Upper Alton with Nutter that afternoon; that they came to visit at the house of a friend; that while employed in making that visit, the disturbance commenced; that they had a curiosity to see what would be done, and went up towards the warehouse. But, gentlemen, no one will pretend before you that all who were present, idle spectators of that affray, were guilty of the crime actually committed. If such is the doctrine, heaven save the Court, this Jury, this Bar, and, I doubt not, two-thirds of those now within the walls of this room. This witness states to you that after the affray was all over, Nutter was finally persuaded to go to the building, and here it is that the witness for the people first spied him. Here is the first evidence of his being upon the ground at all, and you will judge how far this goes to his conviction.

I do not deny that Nutter picked up a piece of the press; but I ask you to say, under the evidence you have as to his declarations at the time, that it was at most but a careless act. “This would be a good thing for painters to rub paint with,” was the remark made by him, as, after having finished his examination of the piece of the press he had picked up, he let it fall to the ground. Why, gentlemen, what stronger evidence could you have of this man’s intention? what more conclusive proof could be given that this man was drawn there by mere motives of curiosity? Why is it that you hear

no such remark from the mouths of other individuals? Would it be likely, gentlemen, that this man would have made a remark like that, if he had just come in, heated by the struggle, and glorying in the triumph which he might have achieved? No, gentlemen, no such thing! The remark itself, unconnected with any other fact, would be proof positive that his intentions were not criminal in being there that evening.

Besides, if his intentions had been criminal; if his object had been the destruction of the press, think you he would have kept aloof till that late hour? think you he would not have been seen and identified, as active in the perpetration of the crime? think you he would not have been recognized and sworn to as present, aiding and abetting, before the press was actually destroyed?

Gentlemen, his remark at the time he picked up the piece of the press is no more inconsistent with guilt than all his actions.

Why should he have come forward at that late hour, when the battle had been fought—the victory won—when the house had been taken—the press captured and destroyed? What object could he have had in making himself so active—so conspicuous after the affray was all over?

No! no! the proof, if the evidence proves anything, shows fully and conclusively his entire innocence of the crime alleged against him. With a simple remark as to one other fact, I will leave the case. The Government will ask you to believe this man guilty, because one witness has sworn that Nutter threw the piece of press which he picked up into the river. But, gentlemen, may not this witness have been mistaken? Is it not just as likely that the piece rolled into the river, as it fell from the hands of Mr. Nutter, as that he threw it there? Is it natural that directly after a remark which denoted entire innocence of criminal intention and design, he should have committed an act which would at once fix guilt upon him?

Gentlemen, to constitute crime, there must be not only an act done, but done from a bad motive, from a bad design. There must be a criminal intention, or the charge alleged

against Nutter fails entirely. I leave the fate of this defendant in your hands, confident that you value too highly the rights and liberties of a citizen to sacrifice them to the prejudices of an excited community; trusting that you will jealously guard his interests; knowing that you will require a strong array of facts—proof strong as that from holy writ—before you will deprive him of his good name, and doom him to a felon's punishment.

MR. SAWYER, FOR THE DEFENSE.

*Mr. Sawyer.* The duty of opening the case in behalf of the defendants has devolved upon me, and I will promise you that I will consume no more of your time than is absolutely necessary to enable me to do justice to the case. The trial is of vital importance to the defendants, inasmuch as it is with you to say whether they shall go hence free, or with the judgment of the Court pronounced against them, for a violation of the laws of the land. It is of deep interest to the community, too, inasmuch as this is the last of all the indictments presented by the Grand Jury, and which grew out of the riot which took place in this city on the night of the 7th of last November. The testimony is so insufficient to warrant a conviction, that I would not address you at all, if, provided I said nothing, it would not seem that I was negligent of the duty of my profession.

In the first place, is there any testimony that these individuals did enter the storehouse of Godfrey & Gilman and break and destroy the press?—for that is the charge brought against them. You are not to try the question whether or not any of the citizens of Alton, on the night of the 7th of November last, collected in a riotous and tumultuous manner; and therefore you have nothing to do with a greater part of the testimony. Then what is the evidence? Mr. Broughton was first called, but he knew nothing about it. Next Mr. West came, and what says he? Why, he told you what information he received from Solomon. But is that any evidence that Solomon was concerned in the breaking up of the press? Where,

then, is the evidence that Solomon was concerned? Did his meeting with West prove it? I think that upon your oaths you will say it did not. Then he speaks to you of stones thrown and guns fired—and then of the fire being set to the house—then he comes to the entering into the warehouse, and he tells you that the crowd rushed in—but does he tell you there was any violence used to break into the warehouse? There is as yet no evidence that any person used any. But West did not see the press broken up. He tells you that he saw Palmer, Butler and Carr, but that he did not see them do any act of violence—he did not see them do anything. There is no question, gentlemen, but a number of persons assembled at that time and place; and that acts of violence were done, but these acts are not brought home to the defendants. Then comes Mr. Krum; and his testimony is but a reiteration of what West swore to. Where is the evidence which shows that any of these persons were guilty of breaking the house or press? Krum swears to no such thing. All he testifies to is that he saw Beal at the back part of the house and that Beal said something about the boys hanging together; but does that prove that the defendants were guilty of the charge brought against them? But may not Mr. Krum be mistaken? Why should not Mr. Greeley have heard this declaration? from Mr. Krum's own showing he was by his side. There is no evidence then from Mr. Krum of the guilt of the defendants; not the least particle. There is no question but that these persons assembled before the warehouse; no question but that they were noisy; perhaps a little riotous; but that is not the charge. If the indictment is not sustained by the testimony it is not the fault of the defendants. The Prosecuting Attorney cut the garment, and if he could not make it fit, he can't expect us to. Sawyer proceeded to state that all those who were spectators, and who did not assist to suppress the riot might have been indicted as well as the present defendants.

The COURT. I wish to state that though the citizens did not aid me, I was satisfied it was on account of the great excite-

ment which existed; and from a consciousness that it would require a strong and well organized force to quell the mob. We had no such force in the city, and the acts of those outside passed in such quick succession that the citizens had no time to adopt any efficient means of resistance. I make this remark, that it may not be supposed I thought the citizens would not have aided in suppressing the mob, had they been properly organized.

*Mr. Sawyer.* It is in evidence that the Mayor addressed the crowd. Now, by the 113th section of the criminal code it is enacted, "That if two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, sheriff, coroner, constable, or other public officer, persons so offending shall, on conviction, be severely fined in any sum not exceeding fifty dollars, and imprisoned not exceeding one month."

Now that is the law for the prosecution to have indicted these persons for violating; but they have chosen to take a different ground; they have chosen to charge us with destroying this press, and I suspect they will think, as the devil did when he heard the pig squeal, that there is a great cry and little fleece.

But this press is the firebrand which has produced all the excitement and disturbance out of doors; this press is the thing kept constantly in mind—its destruction is what is so horrible; and I suppose that these friends of the press thought if they could only convict these few poor men of having destroyed it, that it would be a crown of glory on their heads. The Prosecutors have therefore brought their indictment for the destruction of this press, and they must abide it. If, however, in trying to prove that these persons destroyed the press, they should prove that they committed any other offenses, you are not to try them for it, at least not now.

Then Mr. Robbins was called, but he knew nothing more than Krum. He knew of no riotous conduct; he saw no force or violence used in the house. Does his testimony prove anything? I contend not.

Aaron Corey was called next. He knew nothing except that he heard a great noise; and how far does his testimony go? Mr. Miller came next, and he says he saw no man engaged in a violent manner in the house.

Mr. Quigley was called next, and he swore that he saw people at the Tontine; that he heard Gilman address the crowd, and heard a man reply to him—he thought the man was Carr; that he stood in the door of the warehouse, and heard Smith say that he had been throwing stones, and that is all he knows. He also says that he saw Nutter with a great coat on. But does all this prove the allegations in the indictment? He also tells you that he saw Beal at the Penitentiary wall, and that he had no gun; and I presume Quigley must know about this fact better than any one else, as he had better opportunities for knowing; and I ask you to presume that Beal had no gun until he picked up one of those which were left by the foe in their retreat. Quigley saw none of the defendants in the house.

Samuel Avis came next, and he knows no more than the others. He saw Beal, and heard him say that he would kill, or he would like to kill, all the damned abolitionists in town; but the witness says that he thought the remark was spoken in jest; and a pretty good reason I think you will say he had for his supposition, since being an abolitionist, he is here to tell you what he saw and heard that night. Apply this evidence to the indictment and does it prove anything? I think not.

The next witness is old man Beal, and he swears to nothing at all. All you can get from him is, that he was afraid; that he dare not move from the post up by Marsh's store.

This is all the testimony, and these are all the witnesses on behalf of the prosecution.

And now let us recur to that on the defendants' part.

The first one introduced was Mr. Gilman, whose name figures in this matter with considerable—anything you have a mind to call it, gentlemen, and he swears that he did not own the press. Then, if you find the defendants guilty of the

charge in the indictment, will you not find contrary to Gilman's testimony? The people must prove what they charge; and it turns out that this Mr. Gilman was not even the special owner of that press; that he was not the bailee of it. He swears that the press was consigned to Mr. Roff. Admitting, then, that the prosecution may travel out of the indictment, and prove that he was the special owner of the press. Have they proved it? A bailee is one who keeps property for hire or gain. It is the reward which he receives for keeping the property, which attaches responsibility to him in case of loss or danger. If one of you keep a trunk for me—but without any reward for it—and the trunk is lost, are you responsible? Do the prosecution show that Gilman was the keeper of this press for hire or reward? No, but the contrary, and by their own showing; by the testimony of this very Mr. Gilman, if this press was in any one's possession, it was in Mr. Roff's.

The rule I have laid down is the law, and I challenge the production of any other from my aged friend. Gentlemen, there is no further testimony to be commented upon, except that of Shemwell, in regard to Mr. Nutter. He swears to you that he and Nutter came down to the city to do business; that that business was with the ladies; and as he was a single man I shall leave it to you to imagine what that business was. I do not believe Nutter is guilty, because of my own knowledge I tell you that he expressed disapprobation of the doings of that night. Although he might have picked up a part of the press, it is no evidence of his guilt. If it were, you might be called upon to convict one-half the community.

With these remarks I submit the case to your consideration with perfect confidence in the result, knowing you cannot doubt the innocence of these individuals.

MR. LINDER, FOR THE DEFENSE.

*Mr. Linder.* It is now, gentlemen, near six o'clock, and I do not doubt that you are somewhat wearied after the long



examination to which you have listened. After a long struggle, I am enabled to have a cheerful prospect before me. Recognizing the clear heads and the strong minds of those who sit upon that jury, I feel like a sailor, when, after a long voyage, he catches the first glimpse of land. I have been out at sea for the last three weeks, and, fore God, gentlemen, this is the first sight of land I have had during that period; and it is with great pleasure that I find I am to appear before a jury capable of appreciating the questions to be submitted to them in the further progress of this cause.

The trial by jury is the greatest blessing we enjoy—it is the greatest boon we have received. It is the shield of the citizen, which is to protect him from the attacks of prejudice and power. It is truly the pillar of fire by night, and the pillar of cloud by day. The citizen may stand upon this prop, and defy the attacks of arbitrary power; and these individuals, hunted as they have been; pursued with all the bitterness and malignity which wealth and talents can command; protected under that shield, and guarded by that prop, may stand erect, and bid defiance to the storm which howls around their heads.

A strong and well organized effort will be made to secure the conviction of these defendants. I am willing to make issue with the prosecution. This occasion will be seized, by the venerable gentlemen who is to follow me, as a favorable opportunity to pour out some portion of that invective for which he is so admirably qualified. My remarks will undergo a severe scrutiny. You will be addressed in the cold and chilling expression of puritanical feeling, and the severe language of the law; and while I was anticipating the remarks to which you will be called to listen, as I came down to this court room from dinner, and looking upon the broad current of the mighty river which floats by these walls, I could not help drawing a comparison between the fate of his address in the hands of this jury, and that of the ice which is borne along upon the bosom of the water; and I could not help feeling, that his address would meet with the same fate in the warm

hearts of this honest jury, that the ice finds when it is borne by the current within the influence of a warmer atmosphere.

I know no greater gratification than to appeal to a jury whose hearts are warmed by "sympathy for others' woe."

It will be unnecessary for me to awaken or disturb the feelings which, in time that is past, have distracted this community. I have no object to obtain in so doing. My simple desire, my plain purpose is, to submit to you the facts which have been testified to, and the law which must govern you, and then leave you to determine whether these defendants are guilty or not of the charge preferred against them. This is my duty. Your duty is also plain and easy. You are sworn to try the issue made up. What is that issue? What is the allegation upon the one side, and the denial by the other? I will present it to you, as it is contained in the indictment, and I ask your careful attention to the charge there made.

The Grand Jurors chosen, etc., upon their oaths present, that John Solomon, and others, now upon their trial, on the night of the 7th of November, A. D., 1837, with force and violence, entered the warehouse of Godfrey & Gilman, and unlawfully, and with force and violence, a printing press, then and there found, the property of said Godfrey & Gilman, did break and destroy.

To this charge the defendants have plead that they are Not Guilty—as charged in the indictment.

Recollect, gentlemen, that that press is charged to have been the property of Godfrey & Gilman, the latter of whom cuts so conspicuous a figure in this whole affair. And when my brother Sawyer was trying to tell you what he thought of the man Gilman's conduct; was hunting for some word which would convey to you his idea of his actions, I was forcibly reminded of a publication which I once saw, and which was made for the purpose of giving to the world the writer's opinion of the character of some individual or other. After the writer had exhausted every abusive word which he could think of, for fear he had not conveyed his meaning strong enough, he proceeded thus: In conclusion, if there is any

epithet in the vocabulary of the English language more abusive than any other, the reader will please to consider it applied.

Then, gentlemen, the charge made against these defendants is, that they entered the house with force and violence. What evidence is there? whose testimony proves to you that they unlawfully or violently entered the house? Who entered first? Why, West led the way. Was there any door broke? Did any individual swear to you that these persons made use of any violence, more than all of the crowd who rushed into the house, impelled by natural curiosity? If, from the circumstance of entering alone, you are to suppose that the entry was forcible and violent, then there are an hundred individuals as guilty as these. In the decision of this case you are to inquire about nothing, except the entering the house and breaking the press. You have no concern with the throwing of stones, or firing of guns, in the early part of the riot.

The proof must not exceed the allegation; one is not the ceasing of the other; and under this charge you cannot convict these persons of being guilty of another crime. Now Rocks and others have been indicted for burglary, and a *noll. pros.* entered, and under this indictment, you cannot convict them of any other offense, than that of forcibly and unlawfully entering the house, and breaking up the press.

But it will be said by the counsel for the prosecution, that they do not ask you to convict these people of burglary; but that they have introduced evidence to you to show that high misdemeanors were committed on that night, by way of aggravation.

Is it, however, gentlemen, a necessary consequence, that because these men were upon the spot armed, that they entered the house in a violent manner? is it a consequence, that any door was broken? that any tumult was committed? that there was any violence used after the entry was made? A violent and forcible entry is not proved, from the fact, that there was a rush, when it was known that the house was abandoned;

but the jury are bound to presume that the rush was made by men innocent of crime; yet, who, from the knowledge of Bishop's and Lovejoy's death, and Roff's and Weller's wounds, were eager to enter the house, that they might early see all the consequences which had resulted from the engagement. West led the way. Corey went in with all the others who were anxious to gratify their curiosity. And these men were as guilty of a violent entry as any others, although they were entirely unconnected with the mob in the other acts of violence and riot. Where is the witness who swears to any act of violence committed in entering the house, by any of those indicted? There is none, and therefore the first charge falls to the ground; there is no pillar to support it; it exists only upon paper, without the least shadow of proof to sustain it.

We then come to the second charge made against these persons, that of breaking up and destroying the press. Where is the evidence to convict them upon this charge? for if you are called upon to convict them, from the mere fact that they stood by and witnessed its destruction, then farewell to the innocence of your Judge, your Mayor, your peace officers, and all those citizens who, from curiosity, attracted by the thrilling interest of the scene, had assembled to witness the proceedings of that night. All who were there, friends as well as foes, are, upon that principle, guilty of this crime. One man only is proved to have been guilty of breaking the press, and he is not upon trial; no one swears that he saw any of these persons throw out the press; no one tells you that he saw any of them assisting in the act, but, on the contrary, all swear that they first saw the press on the ground, between the warehouse and the river; and Frederick Bruchy hammering upon it, as he had been accustomed, I believe, to do upon other presses.

Nutter only, besides Bruchy, is connected with this press, and what did he do? Why, merely this; he found a piece laying on the ground, picked it up, remarked that it would do for painters to rub paint with, and threw it down again.

This, gentlemen, is all the testimony which bears upon the point in issue. This is all the evidence that has been offered to your consideration, to prove these persons guilty of breaking up and destroying that press.

And, gentlemen, upon the strength of this testimony you will be asked whether you will let these individuals go unpunished? Loud declamation, horrific appeals will be addressed to you, based upon the criminality of the acts done at the first commencement of the riot.

But it is not our fault that we are not indicted for those acts; it is not our fault that the bill of pains and penalties is not broad enough to cover all the offenses committed that night. If they were so strongly bent upon proving us guilty of criminal acts; if they expected to convict us of participation in the riot, it was the duty of the Prosecuting Attorney to have laid his indictment broad enough to have included all the facts in the case. But as it is, the course the counsel have taken puts me in mind of a story once told by Mr. Clay: A fellow wanted a search warrant, to enable him to hunt for a turkey, which had been stolen from him. The magistrate, to whom he applied for the warrant, after examining all his form books, said, that he could find no form for a turkey. But said he, I find one for a cow, and I will give you that, and while you are looking for your cow, "perhaps you may find your turkey." Now we stand in just such a situation. The government are attempting to convict us of a riot; of criminal acts done out of doors, done too previously to the commission of the offense for which these persons are on trial, under an indictment for an unlawful and violent entering of a house; and the only way in which they endeavor to prove guilt, is by showing you that certain acts were done, and then asking you to draw a presumption that other acts were done.

They ask you to return a verdict of guilty upon presumption alone. Now I put the question to you, whether if these persons did enter that building with force and violence, from the crowd of people who stood around, from the cloud of witnesses they have arranged upon that stand, the prosecution

could not have found some one, some little boy, at least, who saw the offense committed?

They have failed to produce any witness to prove such fact, and that is an incontestable rebutter to any such presumption as the one they will ask you to draw. The same remark will apply to the breaking up of the press.

But it is not worth while to say anything else about the riot; or about the breaking up of the press. At times, in the investigation of some crimes, it may be more safe to rely upon circumstantial evidence to prove guilt, than upon a connected story. As for instance, in the case of murder. The person who sets himself about the commission of such a crime works in the dark; he selects his time and opportunity so that no one can observe his actions, or defeat his plan; and, from the necessity of the case, we rely upon circumstantial evidence to bring the person to justice.

But this act was not done in a corner: it was not an outbreak of popular violence, such as is seen in times of revolution; but it was done at a time when all could see the persons of those so engaged, and was the result of long premeditation. Neither was there any attempt at concealment on the part of those engaged. All openly carried their guns by their side; all who said anything on the subject, said boldly, and this too, to your civil officers, as well as others; that they would have the press at all risks. All the witnesses called, swear that Bruchy was the man who destroyed the press. If anyone else assisted, where is the evidence of it? Now let me ask you one question. You must recollect that where there is a rational doubt of the guilt of a person on trial, the jury are bound to acquit; and can you swear that any of these persons broke that press? or can you say that any one of them authorized its destruction? You, as jurors, will not volunteer for the prosecution; if the people have failed to show the guilt of these persons, you will not lend them your aid; you will not convict them of this crime upon a presumption that they are guilty. Suppose Dr. Beal was guilty of this crime; it might have been him, and suppose you say so; suppose you start

with that presumption, there is no evidence as to his guilt; and without such evidence, in what situation are you left? Why, in doubt; and if you are once in that situation, you are bound to acquit.

The law sets too high a value upon the rights of individuals, to permit a conviction upon any other than positive evidence. I regret that the prosecution are in this dilemma. If they had laid their indictment broader, I really think that the "boys" would have stood a bad chance. But the good stars of these men so provided that the indictment should specify but two distinct allegations; and those of acts done in the house. But the circumstances! the circumstances! cry the gentlemen; the keg of powder! the stones that were thrown! the guns that were fired! the voice from the crowd addressing Gilman! the fire at the building! the battle cry! the shouts of victory. Well, what of them? They don't prove the fact that these people were actually guilty of violently entering the house; or of breaking up and destroying the press. They only prove the commission of a distinct and different offense. The indictment might have been formed so as to have included these facts; but the Grand Jury neglected so to do, and we claim the advantage.

I have got the government upon an island, and I intend to keep them there; and unless the government can satisfy you that these individuals are guilty of the crime alleged against them, you are bound to acquit them. Are you to select these eight out of the hundred men who entered that building with them, and say that these, and these only, are guilty? Are you sworn jurors? or do you set there as sworn guessers? You can't say one is guilty and another is innocent. You can't make this selection: you can't be permitted to guess in this way.

But it is a waste of words and of time to comment upon the danger of trusting to circumstantial evidence. Monuments still stand to attest to the fatality occasioned by credulous juries in trusting to such evidence. The books are full of cases to the point. You undoubtedly have heard of the case



where an individual was arrested, tried and executed, for taking the life of his bed-fellow; the jury having been satisfied from the facts which were testified to, of his guilt. It appeared in evidence, upon trial, that they were both put into the same bed at night; that in the morning but one of them made his appearance; that search being made, blood was found upon the sheets, which was traced from the bed, down stairs, out of the house, by a back way, to the banks of the river, where all further trace was lost. The man's companion was arrested; the jury convicted him upon this evidence, and he was executed, notwithstanding his denial of guilt. It turned out some time after, that the man who was supposed to have been murdered, made his appearance again in the country; and his story was, that he had been bled some short time before; that he awoke in the night, found the bandage had slipped from his arm, and that the wound was bleeding afresh; that he got up, went down stairs, and out of doors to the river, and that while he was there, washing his arm, a press-gang came along and carried him on board of a vessel; which set sail without his having an opportunity of afterwards going on shore. And this is but one of a thousand instances with which our books of reported cases are filled. Gentlemen, circumstantial evidence is always, must always be fallacious; it is an unsafe basis for a jury to rely upon. You are not safe in so doing. All history attests the danger of founding verdicts upon it; and the darkest spot upon the pages of English history, upon the records of her jurisprudence, is that which attests the credulity of her juries.

And what is the character, what the complexion of this evidence? It is all circumstantial; and it seems like occupying and reoccupying the same ground to comment upon it.

I will submit two plain points to your consideration, and leave the case.

And first, has the prosecution shown that the press was the property of any one at all? They have shown it to be Roff's, if they have proved it to be the property of anyone. It was consigned to Roff, and because it was considered more safe at

Godfrey & Gilman's than at Roff's, because it was landed there, because it was stored there, it does not follow that it thereby became the property of these men.

I recognize the doctrine, that if I store property with you, and it is taken from your possession, you have the right of action for its recovery. But I do not recognize it when applied to criminal cases.

Have the government shown that any one had property in this press? Where is the witness who has sworn to the ownership of it? Gilman tells you it is not his; but he tells you a long story about it, and leaves it to you to draw your own conclusions. Whose was it? not Gilman's, for he swears it was not his—not Godfrey's, for Gilman swears he did not subscribe to the other press. Whose was it then? Gentlemen, do you believe Lovejoy would have offered himself as a victim for a press, in which he had no interest?

In what light shall we regard this testimony, as to the ownership of that press? Lovejoy was to have been the editor of the paper, which was to have been published from that press; then Lovejoy and not Gilman was the owner of it.

Roff was the consignee, and went to defend it: then Roff was the owner, and neither Lovejoy nor Gilman.

And if it was not the property of Roff, then it must have been the property of those who bought it, and sent it here, and should have been so alleged and proved.

And as to the ownership of the warehouse—the only proof introduced before you, is that Godfrey & Gilman have title deeds to it. It is proved that Godfrey and Gilman were in possession of the building, at the time of the riot, and possession is evidence of title, only in case of the non-existence of title papers. Where there are title papers, the rule applies that the best evidence should be produced—and in the absence of these deeds there is no legal evidence that this firm owned the property.

Then the prosecution have not proved that this building, or this press was the property of Godfrey & Gilman, and all their allegations have failed. The people have proved noth-

ing—just nothing at all—and this day has been consumed in the enactment of another farce.

But one word as to Nutter. The purpose for which he came down to the city, on the night of the riot, cut a considerable figure in the cross-examination of the witness Shemwell. The young man very frankly stated to you, that he came down to do some business for one lady, with another; and I thought that when that fact was disclosed, common decorum would have prevented the Prosecuting Attorney from pressing the point any farther. But nothing would satisfy the prying curiosity of the gentlemen, till they had ascertained that the young men actually, and *bona fide*, “came a-courting.” Nutter is the only one of the eight persons on trial who is proved, by the evidence, to have had anything to do with the destruction of that press. And I will leave to you to say, whether his act was more than the careless act of a curious person. It was inconsiderate perhaps, but I think you will hardly say it was criminal.

The witness Shemwell tells you, that Nutter engaged in none of the acts of violence, which were committed that night; that he and Nutter kept together all the time, and it was natural that they should have done so. It seems that all who had much to do at that time kept together, as much as circumstances would allow them. When you hear of Rock, the rest of these persons who are on trial were near him. Those in the warehouse kept together so long as they remained in the building, and when they abandoned it, they still kept as close together as the speed of the different individuals would allow. And there was old Morgan, running about like a dog in high rye, crazy, as one of the witnesses said. He always takes care to be on the strongest side, and if the defenders of the warehouse had been successful, no doubt he would have exhorted them, “to go up and finish their work,” as it is proved he did in this case.

Gentlemen, it is not on suspicion that you will say that these men clubbed together—congregated into a body, and violently entered the building, and destroyed the press. It is

not on suspicion, that you will convict these men, even though they are of what the gentleman calls the "genuine democracy." I expect that the democracy will be cut up by the venerable counsel, with all the superciliousness belonging to the well born and well bred. I have yet, however, to learn that an honest jury will convict a man for the "cut of his coat," or because he is seen in a coffee-house, or because he happens to fall into what the gentleman may call bad company.

I have said all. And in conclusion, I ask at the hands of this jury, that indulgence which my situation demands. I know abuse will be, and has already been, heaped upon all of us. Scarce one has escaped it. I know that this community—that the community beyond our own vicinity, are anxiously waiting the issue of this trial. I am aware, that for the exercise of your good sense, of your reason, in the question of the guilt or innocence of these men, your motives will be assailed, your characters attacked, and the basest and vilest imputations cast upon you. But I rely confidently upon this jury, well knowing that against an independent, honest, high-minded jury, the torrent of abuse will be harmless; that like the rock of Gibraltar, which withstands the fury of the tempest, and the waves of the sea, as they beat against its base, so this jury will stand, proudly erect, high above the storm, while the wave of invective are dashing themselves to pieces at their feet.

MR. COWLES, FOR THE PEOPLE.

*Mr. Cowles.* Gentlemen of the jury, it has become my duty in closing the argument in behalf of the People, to bring to your minds considerations of duty, and not to distract your attention from the points in issue, or obscure the exercise of sound legal discretion. You have been chosen to stand between the People and the defendants, and while you are vigilantly to guard the rights of persons, you are also religiously to protect and preserve the interests of the government. Your verdict is to determine, whether law or licentiousness is to

prevail; whether we are to live under the rule of law, or the "reign of terror." Your duty is one of great responsibility; for your verdict is to decide, whether the enactments of your Legislature, or the law of the lawless, is of greater authority. Your position is one which requires great firmness. You may be infected with that spirit, which has wrought deeds of dishonor, and violation to your laws and constitution; you may be infected with that spirit, which has caused a stain upon the character of this city, which the whole current of the mighty Mississippi cannot wash away; which has cast a blot upon the escutcheon of our State, that ages cannot efface. You may be infected with that spirit, which by the sanction it has given to the violent, illegal and murderous acts, of the 7th of November last, has made the name of this city a by-word of reproach to all coming generations. Your verdict may legalize riot, may legalize arson, may legalize murder. If your verdict sanctions those acts, it will sanction any and every dishonor, which can disgrace civilized society.

I trust, however, that almost in the words of one, whom many have delighted to honor, you, by your verdict, will say, that the government must be preserved; that you will prove true to your country, its laws and institutions; that you will prove true to your constitution, and that you will say, that whenever the evil passions of men burst out in crime, you will apply to them the corrective of the law. I trust that a jury of my citizens cannot be found, who are prepared to sanction these outrages; those acts of licentiousness, which have struck a vital blow to the best interests of this city, and defamed and disgraced the character of both its rulers and ruled.

But let us turn from considerations like these. And in the first place, permit me to remark, that you are not bound to return a verdict of guilty against all, if you find satisfactory evidence of the guilt of a part only, of those included in this indictment. If you come to the conclusion, that one or more of these individuals, are unjustly charged with the commission of this crime, and still find that any two or more of them are guilty, you can so return your verdict.

And what is the evidence? Some of the facts testified of before you, are not disguised. The sophistry, and shuffling of the counsel for the accused, could not avail in disguising them. They stand out in too strong relief to be disguised; as they were proved too plainly and distinctly to be denied.

Was the warehouse of Godfrey & Gilman entered with force and violence? Was the press of Godfrey & Gilman violently destroyed? And were such acts lawful? Because, gentlemen, it is no matter what principles that press was intended to promulgate. They will not entice the jury, although they inflamed an armed multitude. You, gentlemen, stand between the living and the dead. The voice of him, who would have spoken through that press, is hushed in the sleep of death; he cannot speak to you from the cold and silent tomb; he cannot speak to you of injured faith, of broken laws, of a violated constitution; he cannot speak to this community, of rights which have been trampled upon, or privileges which have been denied to him; he cannot speak to these men of laws which have been violated, and to those who were his fellow citizens, of duties which they may have disregarded. But by your voice, that press, and those lips may speak trumpet-tongued. It may be a voice which will calm excitement—call back tranquility—restore confidence—uphold law—and invite population.

I trust that you all approach this case, conscious of the responsibility which rests upon each one of you; that you have banished prejudice from your hearts; that you feel a high resolve, to render life safe and property secure; and a noble determination to rally around the institutions of your country, and preserve inviolate your laws and your constitution. You have been told that the institution of a jury, is a noble institution; that it is the shield which protects and guards the rights of the humblest of us all; that it is the rampart behind which the citizen may defy the attacks of arbitrary power, and the barrier raised to protect him, from the assault of lawless force. Could the gentleman have forgotten, that these individuals, whose guilt you are now called to pass upon,

broke down that bulwark, and overthrew that barrier? Could he have forgotten that these men usurped the authority of this tribunal, and overthrew the institutions, they themselves had aided to erect, when they said that that press should be destroyed?

Was that act lawful? Have the people of any village or city, have the people of any precinct or county, have the people of your whole State, a right to say what shall and what shall not be printed? because this is the question you are to decide. You must decide it; because, if you acquit these individuals, you admit that they were justified in the commission of this crime, and you say that a portion of the people may declare and determine what principles may be promulgated through the press, and what shall not.

Let me turn you to your Constitution, and in the 8th article of that instrument, I find that "the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Responsible to whom? That same instrument also tells us that "no freeman shall be imprisoned or deprived of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, except by the judgment of his peers, or the laws of the land."

Who are a man's peers? You, as jurors! and only by you, as jurors, can a man's life, his liberty, his privileges or property be taken away. If there are any who have constituted a different tribunal; who have established an arbitrary power; who have organized a different body, and, by force, have taken away the liberty, privilege, the property or life, of any other individual of the community, have they not usurped the province of your body, assumed the prerogative of law, and invaded the spirit and trampled upon the letter of your Constitution? You must be jealous of any invasion of your province as a jury: you must be jealous of your prerogatives; you must be jealous of any violation of your Constitution: because, if you will not, if you do not preserve that instru-



ment unharmed, where are your own rights? either of life, liberty or property? If you prove recreant to your duty; if you are false to the trust reposed in you, where is your redress when your own rights are violated? If you will not maintain the laws of your country, the case of Gilman yesterday, may be yours tomorrow; and like the murdered Lovejoy, when the authorized officers of the law are unable or unwilling to protect, you may be called upon to stand up, alone and unaided, and strike one blow for the defense of your own property and rights, against the lawless attack of an armed and infuriated rabble. And the press has been destroyed, because, in the exercise of a freeman's spirit, he who was to have given energy to its powers refused to surrender any of his rights to the dictation of a band of bravos. Take care, gentlemen, lest you so act that the same body, when offended to-day by the sound of a freeman's voice, by the feelings of a freeman's heart, by the expression of a freeman's thoughts, may strike the knife to his heart, and plead your special license for riot and pillage, for arson and murder, as their best excuse and sole justification. Europe has its nominal liberty of thought and speech, without the shadow of its reality. Germany, land hallowed by the memory of her literati of former days, has given to her princes dominion over the exercise of this invaluable right. France is once more under the rule of the Goths and Vandals; for her Council of Supervision, with their arbitrary power, not only suppress the expression of principles, in non-accordance with their creed, when found in articles designed for instruction, but also when they appertain to those lighter works intended only for the amusement of an idle hour. The governments of these countries are arbitrary; they have established a supervision of the press, an inquisition of the mind. Tyranny suppresses all sentiments of liberty; and the land groans, and the people turn pale under such iron despotism. But in this government, your Constitution has made provision that the press should be free and uncontrolled, has said that the free communication of thought was an invaluable right of man, and

that mind should be free as the mountain breeze. Your Legislature could not restrain the operation of that instrument; could not alter or take away the rights there guaranteed. Yet a mob, an armed band of ruffians, have usurped that authority, and have said that a free communication of thought should not be allowed; that men's minds should be trammelled, if not by constitutional enactments, then by the strong arm of brute force; have said that the press should be destroyed, and that too, before it uttered one word by which its principles could have been ascertained.

The word of a mob has been almost undenied and undeniable law. With profane oaths they swore they would destroy that press; and amidst the cries of the battle field, with the shrieks of the wounded, and groans of the dying, by the light of the incendiary's torch, and over the dead bodies of their fellow citizens, they accomplished their purpose. By the blow which finished the destruction of that press did your own rights receive no wound? The arm that was uplifted to break that press in pieces was raised to violate your Constitution. Can you, gentlemen, as you are asked to do, sanction by your verdict the acts and the actors of that night, and to say God speed to the next violation of your rights and privileges?

Now who were concerned in these outrages? I admit that you must be satisfied, beyond a doubt, that the defendants are guilty, before you can convict them.

We have proved that the plan of destroying that press was not only long premeditated, but openly avowed.

Do you doubt the formation of such a resolution? It is written in characters no man can mistake; it is proved by evidence as plain as the existence of a noonday sun. Bear with me while I turn your attention to that point; while I show you that the individuals named in the indictment avowed their determination to do the act they afterwards accomplished.

The first witness to the point is West. He swears that he

had a conversation with Solomon, that Solomon communicated to him the plan which had been determined upon; that he saw Beal, and had a conversation with him, in the course of which, and in reply to a request which he made, that Beal would use his influence to induce the "boys" to abandon their project, Beal said he could have no influence and would do nothing about it.

Now recollect the testimony of Mr. Krum, who tells you that Beal, while the mob were breaking up the press, said: "Now, boys, we must stick together, and if any one is arrested we must come to his rescue." Beal had firearms by his side, and made this declaration, after the mob had accomplished the purpose for which they assembled, and which they had sworn they would do. Butler and Rock, too, stood by his side; they too were armed; and can you doubt that these persons were guilty?

Again, a company of fifteen or twenty armed men marched through your streets to Gilman's warehouse. Who were among them? Carr and Palmer addressed the Mayor when Bishop was shot. Rock, Butler and Beal stood near, and Solomon was round, as is plainly proved by the testimony of the Mayor, Messrs. Robbins and West. Admit it is not proven that Nutter was among this company when their resolution of destroying the press was formed, or avowed. It is proved that he was apprised of the act that was to be done that night; that he left his home; that he travelled miles till he reached this city; that he was at the place of attack; and, finally, that he joined in the work of destruction. Why was he here at all? His presence is attempted to be accounted for by a story of an affair of gallantry, but the proof in the case affecting him is too strong to be overthrown by such slight pretext. If he was honest in his intentions, he, like honest old Tray (spoken of by the counsel for the accused the other day, when pressing the guilt of another person), must suffer for associating with Tiger. Whether Nutter wanted the excitement which so powerfully influenced the others, and so kept back till he thought he could safely come

forward, I know not. Certain it is, however, that he participated in the work of destruction which was going on.

Then in regard to Carr, Palmer, Rock, Butler, Beal, Solomon and Nutter, is there any doubt? They declared the press should be destroyed; they attacked the building in which it was; they entered that building; the press was destroyed; and one of them is proved to have assisted in its destruction; and is it not an irresistible inference that those who swore they would, actually did destroy it? Suppose a man's life is threatened, and lost? and you know that an enemy had threatened to take it away? are you not forced to the conclusion that the man who threatened he would, in reality did take his life? Miller swears to you that Carr, surrounded by his confederates, backed up by the presence of Rock, Bruchy, Butler, Palmer and others, told Mr. Gilman that they would have the press at the risk of their lives; and will you doubt, after this avowal of their determination, upon the very spot of the violence, who destroyed the press? or will you doubt who entered the building? or will you doubt that both acts were done with force and violence?

Gilman swears that the defenders of that property abandoned the building for fear of their lives; and yet the Attorney General has told you that there was no force used in entering the building. But suppose a man comes to my house, presents firearms to my breast, demands my property, and, to preserve my life, I retire from it; abandon its defense. Is there no force in such case? Will the gentleman say that I surrendered my property of my own free will? Gentlemen, let us turn to the testimony of Mr. Krum; and what is it? He tells you that when he first reached the ground, he met a crowd carrying Bishop in their arms; that he asked what was the matter; that he was told one of their company was shot; that he asked their object; and that Carr said all they wanted was the press. Is there any doubt about their object? He proceeds, and says that he saw the mob breaking up the press; that he saw it thrown into the river; that Rock stood by with arms; that Beal said, "Now boys we must stick together, and if any of us are arrested we must come to the rescue."

And so with Mr. Robbins, who swears to you that these men avowed their determination to have the press at all hazards; that they had arms in their hands at the time; and that he saw some of those within the walls of the building where the press was stored.

And as it regards Solomon, although he is not proved as having been conspicuous in the attack, still he was shot; and that I hold conclusive proof that he was engaged; because, with the exception of the men who, after their capitulation, were shot at while retreating, no one was shot unless he was engaged. The evidence, gentlemen, proves conclusively, that Butler, Carr, Jennings, Beal, Rock, Palmer, Morgan, Bruchy, Solomon, Nutter and Smith, were engaged in the commission of the offenses for which they have been indicted.

Now, are the jury so incredulous as to believe that unless all went in—all threw out—and all broke up the press, none are guilty? Suppose some entered the building and threw out the press; others broke it up; and others stood by, encouraging and approving the doing and the violence, are they not all guilty? Suppose one man assaults another in the street, and a third person stands by refusing to aid, preventing others from assisting the man who is assaulted; would you say that they were not both guilty of the offense committed?

Then when we prove to you that these individuals swore that this act should be done—and also prove that the act was done, in the presence of these persons, some standing by encouraging those who were engaged in the work of violence, how can you help believing that all were guilty? how can you avoid returning a verdict of guilty against all?

The gentleman tells you of the danger of relying upon circumstantial evidence; and he has arrayed before you all the bugbears which he could conjure from a fertile imagination, to endeavor to deter you from relying upon the evidence which the People have brought against these men.

But we ask you to make no violent presumptions. We prove to you that these men determined this act should be

done; that in pursuance of this determination they assembled together; that in the execution of their plan they assaulted the warehouse; that they forced its defenders to capitulate and fly for their lives; that these people entered the warehouse; that the press was seized by some one, and thrown out of the warehouse; that these persons destroyed it; and the gentlemen call this evidence, such evidence as a jury cannot safely rely upon. Each fact by itself, it is true, is not sufficient to warrant you in convicting these men; but when the links are all united they form a chain of irresistible force; and altogether form a conclusive whole.

You have been also informed by the Attorney General that there was no violence used, in entering this building; and because no doors were broken, you are asked to say that the first charge in the indictment falls to the ground. But I call to your recollection the declaration made by Mr. Gilman, that he left that building from fear that his life would be lost, if he remained longer. Suppose this declaration had not been made? We have proved that the windows were broken out; that the building was set on fire, and were those acts done without the application of actual force? Suppose Rock did not bring the fire which was applied to that building; some one else did; Rock stood by, saw it put to the building; encouraged the act, and was guilty of the violence used.

But it is not necessary that we should prove any actual violence; it is sufficient if we prove a constructive force. A constructive breaking is where by fraud, by trick of any kind, any entrance into a building is effected.

A constructive breaking, is where an entrance is obtained into another's building by threats or violence to the owner's person or property; even though the owner should open the door, with his own hands, and let the individuals in; provided he did so from fear of actual violence. I will refer you to Archibald for the law which I have now given you, and Starkie.

Now, gentlemen, apply to this law Mr. Gilman's evidence. He swears to you, that he, and those that were with him, left

that building from actual fear that their lives would be destroyed if they remained; and I ask you, whether if we have failed to prove an actual entering with force, we have not succeeded in proving a constructive breaking, from the effects of threats and violence to this man's person or property.

But the counsel for the accused have also said that we have introduced no evidence that Gilman & Godfrey were the owners of the building or the press.

It was testified to you, however, by Mr. Gilman, that he and his partner built the warehouse; and that they still had the possession and occupancy of it, and the Court ruled that proof of possession was sufficient to support the allegation of ownership, made in the indictment.

And as to the press, the jury will recollect, that when we asked of Mr. Gilman, whether he was not liable for that press, as a bailee, the Attorney General objected to the question, and argued the point, but the Court would hear no reply from the counsel for the people, holding the law to be undeniable, that where property is alleged to be in any individual, and proof of a special property existing in the individual is offered, such proof shall be admitted, and shall be deemed sufficient evidence of the charge, which the indictment makes.

The Attorney General, in his argument in defense of these men, admitted the correctness of this rule in civil cases, but denied its application to criminal charges.

You will find the law, as it is laid down in the books which you will take with you in your retirement.

Mr. Gilman has sworn to you that Godfrey & Gilman took this property on storage; that they paid the charges upon it; that it was landed at, and stored in their warehouse. True it was consigned to Roff, but it never reached him; he had neither actual nor constructive possession of it, and therefore, it could not be considered, nor have been charged as his property. Godfrey & Gilman, however, had both actual and constructive possession, and the indictment charging the press as their property is well laid. There is no denying the law I have produced; there are no exceptions to the rules I



have read; the whole current of authority supports the position I have laid down to you. We have, therefore, proved to you that there was an unlawful and violent act done; that these persons swore that they would do that act; and that they assembled for the purpose of carrying their threats into execution.

With proof of these facts, do I, speaking in the name of the people, ask you to do too much, when I ask you to observe the oaths you have taken; to regard the law and the evidence you have heard, and return a verdict of guilty? No force in entering that building! There was all the force which lawless violence, in the exercise of unregulated authority, under the excitement of unbridled passion could make; there was that force which compelled the owner of that property to abandon his castle and flee, for his life, from the hot pursuit of bravos bent upon murder. If the fire, or the powder, had actually burnt up or blown up that building, would there have been force? and was there none because the fire which was applied did not actually consume it to ashes?

No, gentlemen! the People have proved all they are bound to do; they have sustained all the allegations they have made, and having discharged the duty incumbent upon them, the counsel for the People now ask you fearlessly to perform that which is incumbent upon you. They ask you to stand up for your laws, and constitution, and put your frown upon this attempt to drown the voice of the law, by the louder uproar of an excited mob.

They ask you to believe these men guilty upon the evidence you have heard; upon the proof before you, that a plan to destroy that press was formed; that the place where it was stored was besieged, and attacked; that the windows were broken; that the building was fired; that from fear their lives would be sacrificed, the defenders abandoned the building; and that the press was destroyed, and destroyed by a portion of these very men; the remainder standing by with arms in their hands, ready to assist in the work of destruction, or resist any interference, or interruption, which might be offered

to the full accomplishment of their purposes. Like the bundle of twigs which, separated from each other, a child might break; yet which when bound together, would resist a giant's strength; so is this evidence; separate the facts, and the proof they offer is weak and inconclusive; unite them, and they form irresistible proof of the guilt of these individuals. Thousands of cases are found in the books, where convictions have been had upon less conclusive, less satisfactory evidence.

Why the remark, "we must stick together, and, if any one is arrested, all must rally for his rescue"? What does the language mean? Why should it have been used? Why should the tongue of any man give utterance to such thoughts, unless he was conscious of guilt? What danger was there that these men would be arrested, unless they had committed an unlawful act? Why must they stick together, unless they were then casting about for some means of preventing the law from reaching its victims?

These are not the expressions of men conscious of innocence! No! they proceeded from one who knew he had violated the laws of his country. The conclusion to which a candid, an honest and impartial jury must irresistibly be led, is, that these misguided men, who had worked themselves up to the belief that they were about to do a meritorious act; who falsely imagined, that when this deed was done, they should have suppressed abolition, and thereby rendered good service to their country; when the whirlwind of passion had passed, when the hour for reflection had come, realized the enormity of their guilt, and resolved to trample upon other laws than those they had already violated.

I am no abolitionist. I have no sympathy for the party; no communion with their creed. But I am a friend to law; an enemy to mobs; and an advocate for good order. I am opposed to the lawless acts of an unprincipled, an infuriated, a licentious mob. I am opposed to any resort to brute force, much more when it is resorted to break down the barriers which the constitution has thrown around us all. Put down the freedom of thought! suppress the freedom of speech! re-

strain the freedom of the press! Lawless force cannot do it. The effort will be useless; the trial will be as idle as was that when Canute the Dane planted his chair upon the sea shore, and commanded the waves to roll back from their appointed place. That effort was idle; but not more so than this one. The press still speaks out in tones of thunder, and it will speak out in tones that cannot be resisted, and in a language which cannot be misunderstood or disregarded. You cannot put down the press by force. I warn you; I warn all against such inconsiderate acts. Let abolitionists think if they please; let them speak if they choose; let them print if they will. Freedom of thought is the birth right, and freedom of speech the charter of every American citizen. Let him use his privileges, let him exercise his rights, "responsible to his peers and the law of the land."

This verdict will determine, for weal or for woe, the fate of this community. If lawless violence can be restrained; if it is ascertained that mobs shall not rule over us; if it is determined that licentiousness shall not prevail; that crime shall not be legalized among us, then all will be well; but, if the verdict of this jury is to sanction the deeds of violence and murder which have disgraced this city, then who will stay, or who come among us?

Remember that the eyes of this community, of the whole country are upon you; that the record of this trial will go to the world, and that upon yourselves it depends whether you are honored through coming ages as men, who, in an hour not without its danger, fearlessly asserted the prerogatives of law, or whether your names shall go down to all after time, as fixed figures for the hand of scorn to point his unerring finger at. I have an unyielding hope, an unshaken confidence that this jury will apply the law and the evidence as it should be applied. I have a firm belief that you will act well your duty to yourselves, your country, and your God; and that you will, so far as in you lies, remove the stain which now rests upon this community.

I throw the responsibility upon you; I have faithfully laid

before you the law and the testimony; I have discharged with what ability I ought, the duty which devolved upon me; I wash my hands of the consequences; I throw from my shoulders the weight of responsibility which has rested till now upon them, and I lay it where the law has placed it, upon your heads. In your hands is the fate of the accused; the cause of good order; the interests of society; and the maintenance of the laws.

#### THE VERDICT.

The *Jury* retired, and after waiting about an hour, the COURT adjourned; previously instructing the officer not to permit the jurors to separate unless they should agree upon a verdict. If they should agree during the evening, the verdict was to be sealed and placed in the hands of the clerk.

*January 20.*

The COURT met at 9 o'clock this morning. The *Jurors* answered to their names as they were called.

The verdict of the *Jury* (which had been given to the clerk the night before sealed) was declared to be, *Not Guilty*, by Alexander Botkin, Foreman.

## THE TRIAL OF ANTHONY BURNS FOR ESCAPING FROM SLAVERY, BOSTON, MASSACHUSETTS, 1854.

### THE NARRATIVE.

A slave named Anthony Burns was missing one day from the plantation of Mr. Suttle of Virginia. Several months passed without anything being heard of him when one day there came to the black's brother, who was a slave, too, a letter postmarked in Canada. According to custom, the letter was opened by the overseer, who discovered it was from Anthony, who was advising his brother that he was in the employ of one Pitts, a clothing dealer in Boston, Massachusetts. Thereupon Mr. Suttle, with a friend named Brent, went to Boston and found the slave at the place indicated. He told his master that he had not run away because he had been badly treated, but, happening to go to sleep on board a boat on the Potomac, he had not awakened until it had sailed and was in this way carried to Boston. At first he said he was quite willing to go back to Virginia, but the next day, having been advised by his friends not to return, he changed his mind, and Mr. Suttle was obliged to apply to the United States authorities to have his property restored to him.

The abolitionists were becoming very influential in New England, and they made a great noise when they learned that a Southern master was endeavoring to take back into slavery this negro, in the very shadow of Faneuil Hall. The National Fugitive Slave Law, which gave to the Federal Courts the power to deliver up to the owner any negro who had escaped from the Southern States, was very unpopular in Boston; and the night after the case came before the Court a great public meeting was held which was addressed by some of its leading citizens. Wendell Phillips and Theodore Parker made most violent speeches, and their invectives

caused the crowd to rush from the hall to the Court House Square with cries of "Liberate the negro!" They soon became a mob which attacked the court house with axes and a battering ram. Pistols were fired, knives were drawn, and one Batchelder, a Deputy Marshal, was killed as he resisted the entrance of the mob. The rioting lasted several hours, until the city police, the State militia and the Federal soldiers from the Navy Yard took possession of the square.

On the trial next day, the evidence was clear, but the lawyers retained by the abolition party made long arguments, not only attacking the regularity of the proceedings, but also the constitutionality of the Fugitive Slave Law. And they brought a number of witnesses, white and black, who swore that they had seen Anthony in Boston some time previous to the day he was alleged to have left Virginia. The Judge, however, refused to be governed by testimony which was clearly manufactured, and the threats of the multitude were powerless to induce him to set aside the law of the land. He ordered the return of the slave to Virginia.

The decision having been rendered, the court house was cleared of the crowd of spectators, as was the adjoining square where a great concourse of people were assembled to learn the result. Soldiers and policemen lined the streets, and the artillery guarded the entrance to the streets around the court house. Soon Anthony Burns appeared, surrounded by Federal Marshals in a hollow square of infantry. The procession passed through the streets, where every window of every house and store was filled with people anxious to witness the return of the fugitive. Cries of shame, hisses and groans dimmed the cheers of those who favored the enforcement of the law. Some buildings on the route were draped with crape and at some places stones and bottles were hurled at the soldiers. At last the wharf was reached, where the ship that was to take Burns back to Virginia was lying. He was marched directly aboard and taken to the cabin out of sight of the crowd.

The wharves and vessels in the vicinity were crowded with

thousands of men and women. Delay was occasioned by getting the field-piece, which was drawn in the procession, aboard the boat. The word to "cast off" was given, and about three in the afternoon the steamer, escorted by a United States warship, proceeded down the harbor and put out to sea.

### THE TRIAL.<sup>1</sup>

*In the United States District Court, Boston, Massachusetts,  
May, 1854.*

HON. EDWARD G. LORING,<sup>2</sup> *Commissioner.*

*May 25.*

Anthony Burns, a negro, had been arrested by the United States Marshal, Watson Freeman, under a warrant charging him with being a fugitive from labor, having escaped from service in the State of Virginia, where he owed service to his master, Charles F. Suttle, of Alexandria, Virginia. *Burns* was produced in court by the Marshal.

*Benjamin F. Hallett,*<sup>2a</sup> *Seth J. Thomas*<sup>3</sup> and *Edward G. Parker*<sup>4</sup> for the claimant.

<sup>1</sup> *Bibliography.* \*"Boston Slave Riot and Trial of Anthony Burns. Containing the Report of the Faneuil Hall Meeting; the Murder of Batchelder; Theodore Parker's Lesson for the Day; Speeches of Counsel on Both Sides, Corrected by Themselves; A Verbatim Report of Judge Loring's Decision, and Detailed Account of the Embarkation. Boston: Fetridge and Company. 1854."

\*"The Trial of Theodore Parker for the Misdemeanor of a Speech in Faneuil Hall Against Kidnaping. Before the Circuit Court of the United States, at Boston, April 3, 1855, with the Defense by Theodore Parker, Minister of the Twenty-eighth Congregational Society in Boston. Boston: Published for the Author. 1855."

<sup>2</sup> LORING, EDWARD GREELY. (1802-1890.) Born Massachusetts. Graduated Harvard 1821. Appointed United States Commissioner 1841; Judge of Probate Suffolk County 1847. For his decision in the Burns' case he was removed from his office of Probate Judge by the Massachusetts Legislature. (See 18 Monthly Law Rep. 1.) He was appointed Judge of the United States Court of Claims by President Buchanan and held that office until he retired in 1877.

<sup>2a</sup> See 3 Am. St. Tr. 666. Mr. B. F. Hallett was a very searching cross-examiner and he once cross-examined Rev. Thomas Whittemore at great length. When he had finished he said: "Mr. Whittemore, I have made this long and searching examination as a duty to my client



*Richard H. Dana, Jr.,<sup>5</sup> Charles M. Ellis<sup>6</sup> and Robert Morris<sup>7</sup> for the alleged slave.*

*Mr. Dana.* I arise to address the court as amicus curiae, for I cannot say that I am regularly of counsel for the person at the bar.<sup>8</sup> Indeed, from the few words I have been enabled to hold with him, and from what I can learn from others who have talked with him, I am satisfied that he is not in a condition to determine whether he will have counsel or not, or whether or not and how he shall appear for

and not for the purpose of worrying you, for I have the utmost respect for you." Mr. Whittemore, with one of his blindest smiles, replied: "I wish I could say the same to you, Mr. Hallett." Willard *Half a Century With Judges and Lawyers*, p. 282. I met Mr. Sohier (see 4 Am. St. Tr. 99) one morning near the Court House steps when Mr. Benjamin F. Hallett came up and said: "Good morning." Mr. Sohier said: "Well, brother Hallett, how does the world treat you nowadays?" "Shockingly, sometimes," replied Mr. Hallett, "the other day a man called me Judas; however, I did not care." Mr. Sohier instantly replied: "Well, but what does Judas say?" Willard, p. 324.

<sup>3</sup> THOMAS, SETH J. (1807-1896.) His early life was spent in Boston in business, and was interested in politics. Member Massachusetts General Court and came near being elected Speaker in 1843. Later he studied law under John P. Healy, who was a partner of Daniel Webster, and became an expert jury lawyer. He was a man of high integrity. Was father of the founder of the F. H. Thomas Law Book Co., St. Louis.

<sup>4</sup> PARKER, EDWARD GRIFFIN. (1825-1868.) Born Boston. Graduated Yale 1847; studied law under Rufus Choate; admitted to Bar 1849, and practiced in Boston until the Civil War. In 1857-8 he edited the political department of Boston Traveler. Volunteer Aide on General Butler's Staff 1861. Adjutant General and Chief of Staff to General Martindale 1862. Settled in New York after the war, in charge of American Literary Bureau of Reference. Editor, *The Golden Age of American Oratory and Reminiscences of Rufus Choate*.

<sup>5</sup> DANA, RICHARD HENRY. (1815-1882.) Born Cambridge, Mass. Lawyer, author, best known in literature by his "Two Years Before the Mast," a narrative of personal adventure.

<sup>6</sup> ELLIS, CHARLES MAYO. (1818-1878.) Born Boston, Mass. Lawyer, abolitionist, author. Wrote a "History of Roxbury."

<sup>7</sup> MORRIS, ROBERT. Admitted to Suffolk Bar in February, 1847, and died some year before 1875. Believed by William T. Davis ("Bench and Bar of Massachusetts" 1895) to have been the first colored attorney at the Suffolk Bar. See Willard *Half a Century With Judges and Lawyers*, 1895.

<sup>8</sup> The three counsel had been retained not by Burns, but by the Anti-Slavery Society of Boston.

his defense. He declines to say whether any one shall appear for him, or whether he will defend or not.

Under these circumstances, I submit to your Honor's judgment that time should be allowed to the prisoner to recover himself from the stupefaction of his sudden arrest, and his novel and distressing situation, and have opportunity to consult with friends and members of the bar, and determine what course he will pursue.

*Mr. Parker* opposed the motion.

JUDGE LORING addressed the prisoner, who seemed frightened at his position, and informed him it was his right to have all the allegations made against him proved by the clearest testimony; that he had also the right to have counsel and friends, and that if he desired a postponement, he should accord it to him.

The *Prisoner* seemed in great doubt what to say. He glanced around the court house, apparently in search of some one. After a few moments delay, he, in a low voice, asked to have the case postponed.

The COURT ordered the further examination to be put off until Saturday morning.

*May 27.*

*Mr. Ellis.* We ask for a further delay, for the purpose of preparing the case on the part of the fugitive. We were not counsel for the prisoner at the former hearing, but only interposed to secure public justice, and so that the proceedings might secure public respect. It was not till yesterday afternoon that Mr. Dana or myself felt at liberty to act for the prisoner. I understood that all persons except Mr. Dana were prohibited from access to the prisoner, and I did not feel at liberty, after what had transpired here, to approach him and volunteer his counsel.

We did not volunteer as his counsel on the first hearing. Yesterday afternoon, for the first time, had we any right to prepare a defense. It therefore stands as if this person was seized yesterday afternoon, and was brought in here this morning for examination. Is it fit that this case should be tried under these circumstances? I have never spoken to the fugitive. I therefore ask that a reasonable delay might be granted.

*Mr. Parker* objected to a further continuation of the case.

*Mr. Dana* understood the simple question to be, whether we shall be hurried into a trial now, or shall have reasonable time to prepare for it. The arrest of Burns was at night, under a false pretense, and he was hurried to the court house, which has not been kept as a jail, but as a slave pen. The next morning, at 9 o'clock, he was hurried in here, and, up to that time, he had seen no one. I was going past the court house, and heard there was a fugitive here, and came in voluntarily, and found the proceedings beginning, and offered him my services. I found him stupified, and acting under terror. I believed that the reason which governed Burns was, that if he put the claimant to any delay he would suffer for it. Burns said I might defend him if I chose. I did not wish to take the responsibility under the circumstances. Burns was then left without counsel. An order

was passed to admit me on Thursday to see him; but I was not willing to see him under the circumstances. He had not made up his mind that he wished to make a defense, and I had no right as a member of this bar to go to him until I had a request from him to act as his counsel. The next thing was to get some persons who should go and see him, and Mr. Grimes, the colored clergyman, and Deacon Pitts, were selected.

They asked the Marshal for leave to visit him, and it was refused. An order was procured, however, about noon yesterday, and the Marshal admitted them. It is less than twenty-four hours since these men were permitted to see him, and make known his wishes in regard to counsel. About two o'clock yesterday, his friends called on me and said he wanted to make a defense, and asked me to appear as his counsel. Mr. Ellis was engaged about the same time.

The COURT said that there was a difference in granting a delay in proceedings before this court, in a hearing of this kind, from the delays before other courts, where delays are made for periods of weeks or months, and where important testimony may be lost by the death of witnesses, or by other causes. He looked upon Burns as one who is yet to be regarded as a freeman; he knew of no proof yet submitted that he was to be regarded as anything else. He was arrested on Wednesday night, and on Thursday morning, at the hearing, expressed a desire for delay, that he might make up his mind what course he should pursue. The delay was granted, and he has improved it by obtaining counsel. Now his counsel, being chosen by him, come into court and say that they are not prepared to go on with this case and they cannot go on now and do their client justice. The question of delay is one within the discretion of the Court to grant. He thought the request was a reasonable one. As to the excitement in the community, he regretted it, but he could not consider it in this case. He must look at the rights of the parties and see that justice is done. It would seem that one or two days' delay is not an unreasonable one, and he should thereupon grant further time until next Monday morning.

*May 29.*

When the Judge took his seat the courtroom was crowded, and many armed Marshals and United States soldiers, as well as State militia, fully armed, were present.<sup>9</sup>

*Mr. Ellis.* We protest against the proceedings not on personal grounds, but because it is not right and fit. The prisoner had nothing

<sup>9</sup> On Friday the greatest excitement prevailed in Boston, and the following notice appeared in some of the daily papers and was placarded through the city: A Man Kidnaped.—A public meeting will be held at Faneuil Hall this (Friday) evening, May 26, at 7 o'clock, to secure justice for a man claimed as a slave by a Virginia kidnaper, and imprisoned in Boston Court House, in defiance of the laws of Massachusetts. Shall he be plunged into the hell of Virginia slavery by a Massachusetts Judge of Probate? A large number crowded the hall; the meeting was called to order by Samuel E. Sewell, and Dr. Howe, John L. Swift, Wendell Phillips, and Theodore Parker made incendiary speeches. The latter called for a show of hands on the motion to go to the Court House and free the negro. Wendell Phillips, addressing the audience, said: "Let us remember where we are and what we are going to do. You have said tonight you will vindicate the fair fame of Boston. Let me tell you you won't do it groaning at the slave-catchers at the Revere House—(We'll tar and feather them)—in attempting the impossible feat of insulting a slave-catcher. If there is a man here who has an arm and a heart ready to sacrifice any thing for the freedom of an oppressed man, let him do it tomorrow. (Cries of tonight.) If I thought it could be done tonight I would go first. I don't profess courage, but I do profess this: when there is a possibility of saving a slave from the hands of those who are called officers of the law, I am ready to trample any statute or any man under my feet to do it, and am ready to help any one hundred to do it." A man in the audience cried out: "I am just informed that a mob of negroes is in Court Square attempting to rescue Burns. I move we adjourn to Court Square." Instantly the crowd rushed from the Hall and marched to the Court House. Halting on the East side they endeavored to force the door, but failing they ran round to the door on the West side, with loud cries that the fugitive was in that wing of the building, and proceeded with a long plank, which they used as a battering-ram, and two axes to break in and force an entrance, which they did; a number entered the building but were quickly ejected by those inside. The battering-ram was manned by a dozen or fourteen men, white and colored, who plunged it against the door until it was stove in. Meantime, brickbats had been thrown at the windows, and the glass rattled in all directions. The leaders, or those who appeared to act as ringleaders in the melee, continually shouted: Rescue him! Bring him out! Where is he! etc. The Court House bell rang an alarm at half past nine o'clock; reports of pistols were heard in the crowd and firearms. At least thirty shots were fired by rioters, and the most intense excitement prevailed. The whole square was thronged with people. The Chief of Police arrived with a full force of the police, to stay the proceedings of the mob, now becoming still more reckless and threatening. The police pushed through the excited multitude, and, with great heroism, seized several men with axes in their hands, while breaking down the Court

to complain of in regard to his Honor's indulgence. But I ask if it is fit while counsel bore arms. It is a shame that we should be forced to appear as counsel under such circumstances. It was not

House door. At the time the mob beat down the westerly door of the Court House, several men, employed as United States officers, were in the passageway to prevent the ingress of the crowd, and among them was James Batchelder, who, almost at the instant of the forcing of the door was stabbed by one of the rioters, expiring almost immediately. The military—composed of Massachusetts soldiers, as well as United States troops—soon arrived, and a number of the rioters were captured and the mob dispersed. In the crowd were to be seen the speakers at the meeting at Faneuil Hall.

By morning more United States troops had arrived from the Navy Yard at Charleston, and the body of Batchelder had been removed to his home. The Mayor on Saturday issued a proclamation calling upon the citizens to aid him in preserving peace and by noon the city was apparently quiet, though all the avenues to the Court House were guarded by infantry and artillery. On Sunday morning an immense audience assembled at Music Hall to listen to Rev. Theodore Parker who was to preach there that day. When he rose to speak he read the following letter (evidently not the composition of the ignorant negro):

"To all the Christian Ministers of the Church of Christ in Boston: Brothers—I venture humbly to ask an interest in your prayers and those of your congregations, that I may be restored to the natural and inalienable rights with which I am endowed by the Creator, and especially to the enjoyment of the blessings of liberty, which, it is said, this government was ordained to secure. Anthony Burns, Boston Slave Pen, May 24, 1854."

He then proceeded to charge the killing of Batchelder upon the officers of the law, saying, "Boston is in a state of siege today. We are living under military rule in order that we may serve the spirit of slavery; and Boston is hunting ground for the sleuths of Boston, who, for their pay, went into the court house to assist in kidnaping a brother man.

"They, I say, were so cowardly that they could not use the simple cutlasses they had in their hands, but smote right and left, like ignorant and frightened ruffians, as they were. They may have slain their brother, or not—I cannot tell. It is said by some that they killed him. Another story is that he was killed by a hostile hand from without. Some said by a bullet, some by an axe, and others yet by a knife. As yet, nobody knows the facts. But a man has been killed. He was a volunteer in this service. He liked the business of enslaving a man, and has gone to render an account to God for his gratuitous work. Twelve men have been arrested, and are now in jail, to await their trial for wilful murder!" And he closed this extraordinary sermon with this invective against the judge: "Edward Greeley Loring, Judge of Probate for the county of Suffolk, in the State of Massachusetts, Fugitive Slave Bill Commissioner of the

fit that the prisoner should sit with shackles on his arms. (An officer—He has not them on.) That is all right then, now, so far as that is concerned, but he was shackled on the first day. We protest, also, that we are not to come here to be reminded by force of the claims of the Constitution and the laws.

This room has been packed with armed men, and it is not fit that an examination should proceed. We protest, also, against conducting this case, when all its avenues and apartments are filled with military, making it difficult for any friends of the prisoner to obtain access. It was but fit that every one here present should bear the semblance of humanity upon his countenance and the conduct of a man in his person. But though not denying that some friends enter as an act of courtesy where they have a right, the object seems to be, for some cause, that the countenances about, instead of reflecting the benignity that ought to be shed from a tribunal of justice, shall only state on it with hate. The Judge had said on Saturday he knew nothing relative to the prisoner, as then prejudicial to his freedom; and he hoped that all the proceedings would be conducted on that supposition till otherwise properly, calmly and legally shown.

JUDGE LORING. The examination should proceed. I will give this consideration if necessary, hereafter.

*Mr. Hallett*,<sup>10</sup> United States Attorney. The protest made by counsel not being a matter in the course of the examination, but implicating the conduct of the Marshal and the United States officers for the measures taken to preserve order in and around this court, I feel bound to reply as the law officer of the United States and as counsel for the United States Marshal, at whose request I am present.

JUDGE LORING. It is unnecessary, as I have decided that the examination is to proceed, and there is no motion before the court.

*Mr. Hallett* said he was aware of that; but the United States Mar-

United States, before these citizens of Boston, on Ascension Sunday, assembled to worship God, I charge you with the death of that man who was murdered on last Friday night. He was your fellow servant in kidnaping. He dies at your hand. You fired the shot which makes his wife a widow, his child an orphan. I charge you with the peril of twelve men, arrested for murder and on trial for their lives; I charge you with filling the Court House with one hundred and eighty-four hired ruffians of the United States, and alarming not only this city for her liberties that are in peril, but stirring up the whole Commonwealth of Massachusetts with indignation, which no man knows how to stop—which no man can stop. You have done it all! This is my lesson for the day."

In October the Federal Grand Jury returned indictments against the speakers at the Faneuil Hall meeting—Theodore Parker, Wendell Phillips, T. W. Higginson, John Morrison, Samuel T. Proudman and John C. Cluer—for obstructing the process of the Court. The cases never came for trial, the defendants setting up technical objections to the indictments which were sustained by the Court.

<sup>10</sup> See 3 Am. St. Tr. 666.



shal had been openly charged here by counsel with unlawfully packing this court room and stopping the passage ways with armed men, and such language, if uttered here, should be replied to. He desired to say that the United States soldiers were here in aid of the Marshal, to enable him to preserve order in this court, and to execute the laws, and that they were summoned here as a part of the *posse comitatus*, under a certificate of the judge of the United States district court (Judge Sprague). That proceeding was rendered necessary by the conduct of men who got up and inflamed the meeting at Faneuil Hall, some of whom he saw here within the bar, and who were claimed by the counsel as his friends. The men who committed murder that night came directly from the incitements to riot and bloodshed which had maddened them in that hall; and it was then, and before he knew of the murder, that he, as United States attorney, called on Judge Sprague late at night and upon this representation and his own judgment of the necessity, Judge Sprague issued the certificate upon which the Marshal called in the United States troops to his aid, and they promptly met the requisition. The President of the United States has approved of this course, and the efficient aid which the Marshal has, both armed and unarmed, to prevent further violence and murder, are here by the sanction of the President, and under a certificate of a judge of the United States courts; and therefore it is a proceeding, not only necessary, but such as the Commissioner himself and all good citizens are bound to respect.

The JUDGE. The examination must proceed.

#### THE WITNESSES.

*William Brent.* Am a merchant of Richmond, Va.; was acquainted with Colonel Charles F. Suttle; knew Anthony Burns; the black man in court is the same—the prisoner at the bar; knew Burns in Stafford county and that he bore the relation of a slave to a master, being hired out by Suttle; hired him myself in 1846, '47, an '48, or '47. '48, and '49; know of his being hired out since that time; hired him out last year and the present year, as agent for Colonel Suttle, in Richmond; the wages went to Colonel Suttle; knew him as a slave for twelve or fifteen years; last year,

in March, he was hired in Richmond by a Mr. Millspaugh, Mr. Suttle receiving the wages; when not let out he lived with Colonel Suttle; there was no other Anthony Burns about the places resorted to by Suttle; he had a scar upon his right cheek and a cut across his right hand; he is about six feet high; last saw Burns the Sunday previous to his absence—the 20th of March; he was missing on the 24th; left Virginia on Saturday week morning; do not know how Burns left, only from his own statement.

*Mr. Hallet* proposed to put in the statements of the prisoner since his arrest.

*Mr. Ellis* called the attention of the court to the sixth section of the law, which provides that the evidence of the alleged fugitive shall



not be taken. He therefore objected against such evidence being received.

*Mr. Thomas.* Burns' admissions and confessions were a very different thing from testimony, he not being privileged to testify, as he was a party in the suit—the defendant.

*Mr. Dana* regarded it is the height of cruelty to the prisoner to take advantage of the only power he had under this law, that of speech, to his detriment, when the claimant, the other party in the suit, had not only his own rights, but, in these alleged confessions, a portion of the prisoner's.

The COURT thought that the word "testimony," in the law, must be regarded as referring to evidence given by a witness, and not to confessions or admissions; but, nevertheless, he was unwilling to prejudice the liberty of the prisoner, and his counsel might have the right to pass that question for the present.

*Mr. Parker* asked that the questions might be asked and the answers taken down for future use, if necessary.

The COURT assented and admitted *de bene*.

*Mr. Brent.* Burns said he did not intend to run away, but being at work on board a vessel, and getting tired, fell asleep, when the vessel sailed with him on board. On Mr. Suttle's going into the room after the arrest, the first word from Burns was, How do you do, Master Charles? Mr. Suttle said, Did I ever whip you, Anthony? The answer was, No. The next question, Did I ever hire you where you did not want to go? The reply was, No. Did you ever ask me for money when it was not given you? The answer was, No. Mr. Suttle then asked. Did I not, when you were sick, take my bed from my own house for you? The answer was, Yes. He recognized me and said, How do you do, Master William? Being asked if he was willing to go back, he said he was. Burns' mother lived with Colonel Suttle, and is now on his place; knew of no fact other than Burns' mother living on Suttle's farm, that she was his slave. When I hired Burns I gave my bond to Suttle, who claimed to own him; on another

occasion Col. Suttle gave a mortgage on his property, including this man Burns; he then stated Burns was one of his slaves; when he sent Burns to Richmond to be hired out he described him as his boy; it is customary in Virginia to give passes to slaves when they go about, one of which Burns had when he came to my house in Richmond.

*Cross-examined.* Am 35 years of age; own slaves myself—acquired some by marriage thirteen years ago, and others by my father's death in 1848; have bought some—the last in 1841 or 1842; never sold any myself; never traded in slaves; came on with Col. Suttle, meeting him in Alexandria twenty miles from my residence; arranged beforehand with Suttle, that I should come on with him; he has said nothing about paying my expenses or remunerating me for coming; came with him as a friend; there has been no word or writing between us relative to any compensation; we lodge and room together here; Tuesday after Burns was missing, I wrote to Suttle of the fact;

the man who hired him was named Millspaugh, his term of service commencing on the first of January last; the conversation with Burns since his arrest occurred in the Marshal's room, in this building, in the presence of several police officers, between eight and half past eight o'clock Wednesday night; do not think he had irons on; have seen him with irons on; Suttle said he would make no compromises with him; heard nothing of any remark by Suttle as to Burns better consenting to go back.

To *Mr. Dana*. Burns' mother lives at Stafford; he has a brother and sister; am not responsible for Anthony's connection with

Millspaugh other than as agent, which ceased when he escaped; the conversation in the Marshal's room was not in the very words I have given; have stated it as nearly as I can recollect.

*Caleb Page*. Reside in Somerville; am a teamster; was present at the conversation alluded to with Burns in the Marshal's room; did not hear the first of the conversation; Col. Suttle asked Anthony why he left him, or why he ran away; did not hear the answer, not being very near; Suttle asked him if he did not come in Captain Snow's vessel; Burns replied that he did not; he then asked what vessel he did come in; did not hear the reply.

*Mr. Parker* proposed to put in the record of the Court in Virginia as evidence.

The COURT said it was in the case subject to objection from counsel.

*Mr. Ellis*, after examining this record, said he should have several objections to present against it, which he should like to present to the Court in the absence of a jury.

*Mr. Parker* said the record was decisive of two points—first, that Anthony Burns owes service and labor; and second, that he had escaped—and requested the Commissioner to examine in the manner most agreeable to himself the marks upon the prisoner to see if they were at variance with those described in the document, to prove the identity.

The COURT said he perceived the scars on the cheek and hand, and took cognizance with his eye of the height of the prisoner. "If the counsel wish, I will have him brought to me for further examination."

*Mr. Ellis*. No; we only want all the evidence now put in that may be offered by the claimant to close the case.

*Mr. Thomas* cited the laws and authorities of Virginia relative to the organization and power of the Courts, and of the particular Court whose record has been adduced.

*Mr. Dana*. A book is here presented to show that a person "owes service and labor" in Virginia. We deny the sufficiency of the evidence.

*Mr. Thomas*. The proper way to prove the law of another State is by books, as has been decided by our Supreme Court in 4 Pickering.

*Mr. Ellis*. Saving exceptions, we are willing to close the case.

*Mr. Thomas*. If the book is not sufficient, I wish to prove the fact in another way.

The COURT. I admit the book as testimony to go for what it will.

MR. ELLIS, FOR THE PRISONER.

*Mr. Ellis.* We wish for reasonable delay to prepare for the defense. We need time. The prisoner needs it, and has reason for it. But, understanding the nature of these proceedings, we can only be thankful for the little that we have had at your hands. We too, sir, wish to see an end of what we witness, and we shall go on though utterly unprepared for such an issue, and, after stating the defense to the claim, shall produce such evidence as, in the very brief period that has passed, could be summoned. I trust, sir, if the case of the claimant as presented can commend itself to you as just in law and fact—when viewed alone, we have proof enough not only to make you pause, but to show you that the case is a claim not to be supported by you now.

Sir, of the very brief time granted, but a day in a case to decide more than that man's life, when, if it involved only his coat, the wheels of justice could not be turned in months—most has not been available. This case involves novel questions of law, but the library has been locked up. Access to this house has been difficult. The Sabbath made part of the time. It is now next to impossible even for counsel to enter the court room, through the military forces. The common avenues are entirely barred and impassable. The labor and fatigue of a hurrid preparation have been thus multiplied. Precious as every instant is to one needing to use it to defend another's liberty, I have today lost most of the few minutes pause, forbidden to ascend the stairway, by soldiers with their bayonets at my breast. Still, sir, we must go on.

We shall offer evidence to contradict that produced by the claimant, evidence upon the facts in issue.

But, before stating that, or appealing to it, we claim that here is no evidence offered that will warrant the signing the warrant of slavery.

We stand on the presumption, of which your Honor did well to remind counsel, of freedom and innocence.

We claim, not more from the instinctive feeling of common fairness and humanity, than from the just application of the plain principles of justice and law, that, in a case of this sort, that presumption applies with multiplied force and is to be held most sacredly.

Sir, you sit here, judge and jury, betwixt that man and slavery. Without a commission, without any accountability, without any right of challenge, you sit to render a judgment which if against him no tribunal can review and no court reverse. He may be dragged before you without any warrant; you must proceed without any delay; without any charge, on proofs defined only as such as may satisfy your mind, you may adjudge, and your judgment to surrender will be final forever. Therefore, the proposition will commend itself to your Honor's reason and justice. The mind that is to decide a matter involving questions of law and of fact will not fail to weigh all these questions with the greater care the greater the chances of error and the dangers of its result, and, in this case, require the claimant to prove his case beyond a possible doubt.

Before proceeding with our evidence or stating it, we submit that, on their own showing, they have no case. They offer a paper which they call a record, one witness, and a book they call the laws of Virginia. On this we contend they have no claim to a certificate. This is one defense. We shall show it to be a good one. I design for a time to hold up to view such a case as they venture to present, before proceeding to our answer.

But when on Saturday morning we asked for a delay of a day or two to prepare for the defense, the counsel of the claimant, against this presumption, and against his right, dared to say that we have no defense to make; and today, beginning as we do at the earliest hour on Monday, after less than a day available for labor, really gathering our facts as they are putting in their case, the counsel ventures again to hint the same thing. By what right? By what warrant? On what sort of presumption?

Sir, before proceeding to state the rules of law by which you are to judge this case, I am happy to be able to state that we shall offer proof that this atrocious charge, and seizure made on a false pretense of robbery, have no foundation in fact.

The slave claimant's attorney said, too, that we had no defense to the case but against the law; and that we came here to ask that that should be overridden, and the constitution violated. This too is not true. Not only have I never opposed the law, but I have done something to stay resistance to it. I stand here for the prisoner, under and not against the law. I shall not shrink from debating the just limits of this Bill of 1850. I trust I shall never fear to avow my utter hatred, as a man and a lawyer, of this Bill. But, in reply to this remark, and as a fit suggestion in approaching the debate, I will say, especially do I feel called upon to say, with these surroundings, with this form of seizure, charge, and procedure, in the midst of this Court House occupied like a fortress, filled with troops, every entrance guarded on every step, even counsel denied entrance for a long time, in a cause in which claims are asserted and advocated by armed men, held in a room, packed, in the main, packed, in a proceeding in which the sole law officer of the general government dared to make the exhibition we have witnessed, that if there be any who do need especially to be reminded that there is a constitution and that there are laws, they are not the counsel for the prisoner. It is not I.

Please your Honor, I cannot consent that the counsel for the claimant, as Mr. Thomas thought to do, shall hint to me the line of my duty. I judge not of his course. I notice these things only because of his own provoking. I neither commend nor condemn their action. Their own consciences shall judge them. One, all of course expected to see here. The gentleman who for the first time appears in such a case, and whom it has been my privilege to call a friend, I did not think of meeting. But for myself, I do say, that sooner than lay my hand to the work of aiding in such a case I would see it wither

and rather than speak one word for a slave claimant I would be struck dumb forever.

It is my duty to remark, and I am led to do so more particularly because of the suggestion that we seek not a trial under but a triumph over the law, upon the real posture of the parties and the court. It is highly proper always that the mind, whether on the bench or in the jury box, which is to judge of fact or law, should perceive clearly everything in the position of the parties, the form of procedure, the circumstances surrounding, and the results to follow, that may tend at all to disturb its balance. We stand here, you are here, sir, without a single one of the countless provisions with which the laws so carefully surrounds every tribunal that is to sit in judgment, according to its position, for the preservation of its purity and the protection of innocence.

I cannot approach this case without being oppressed with the feeling that, not speaking merely with regard to the Slave Bill, but in view of the peculiar facts of this case, in almost everything save the one thing wherein our hopes are centered—your Honor's judgment—there is not to be found the image of a thing that can bear the shadow of the name of a trial. May not that mind fail in the coming ruin! *Inter arma leges silent.*

I shall have the honor to submit that some of the few decisions on this Bill on which the claimant relies as authority for this case were influenced by peculiar political views applied to this recent statute, which have no force remaining to support them as authorities, whilst otherwise to be plainly distinguished from this, as most of them are. I now remark that this trial is political. It is strange that whilst our ears are insulted by guns for the passage of a new law to extend the area of the compromise, this trial is started here, and several others at the same moment in other distant places. That the learned District Attorney for the United States should have dared to rise here this morning, disobey the Court, and overawe it, is more than strange. By and by, I shall say it is strange that they call on courts, relying on the faith of treaties which they have trampled on.

I approach this case thus because I must pass by these heaps of rubbish to reach it, because it is my right, and my duty as a lawyer plainly to point out and to speak of every element in the law that may bear on your construction or administration of it, and those circumstances that may mislead, prejudice, or disturb you, and because I think that by this you will feel that we have the better right to fall back in confidence on your resistance to all. In but one thing, sir, in your narrow power of satisfying your mind on the narrowest points, in this alone is left the semblance of justice.

I choose, therefore, to dwell for a moment on all this. Seized on a false charge, without counsel, the prisoner is to be doomed. And then with no power to test jurisdiction, when every one of the writs of the common law for personal liberty's security is found to have failed, without time, without food, without free access to the court, without the show of free thought or action within it, without challenge for favor, or bias, for cause or without cause, without jury, without proofs, in form, or witnesses to confront him, with a judge sitting with his hands tied, in nearly all points the merest tool of the most monstrous of anomalies, with no power to render a judgment, but full power to doom to the direst sentence, I say that, in all things, save one, in your opinion, the prisoner has not the semblance of justice.

Clothed as you are with such transcendent powers, you must feel, and sir we are thankful to have this case before your Honor, rather than—before your Honor, because we do feel that however, whilst holding a post, you feel bound to do its duties, you will, in the exercise of this power to which the world can furnish no parallel, see to it that there can be no error possible, but you judge as you would be judged. Apart from this the prisoner can have no hope. I choose, therefore, before turning to the light, before pointing out the way of escape, to see if any light can be thrown into this mass of blackness that is offered, to confront their case. I wish to look the men in the eye who dare to come here with pistols in their pockets, to ask us to meet a case with our opposing



counsel armed, hemmed in with armed men, entering court with muskets at our breasts, trying a case under the muzzle of their guns. I choose to ask these men, face to face, by what show of right they speak of law and justice. All this is legitimate. It is worth considering. It will be remembered. I leave it.

Sir, it was and will be urged that this examination is preliminary. My learned associate well replied "To what?" Surely it is well to settle the preliminaries, and not to dwell on unimportant formularies. The examination in Virginia I suppose was preliminary. So shall each lay this to his soul who acts at any stage. Preliminary, sir, they know better when they say so. The law looks no further, nothing is to follow. There is no *postliminium*. This is the final act in the farce of hearings. They know, we know, you know, that if you send him hence with them, he goes to the block, to the sugar or cotton plantation, to the lash under which I have heard Sims, who entered the dark portal, breathed out his life, and that man is a fool who expects me to believe otherwise.

Therefore unless a case of overwhelming proof is presented, unless by no possibility could any but the slave of Suttle be seized or surrendered, is this certificate to be refused.

They call one witness; and, as additional evidence, produce a written paper which they call a record—to prove the facts of service, escape and identity under the 6th section of the Bill of 1850. We claim that it is, on their own showing, a possible hypothesis, as we shall offer evidence to prove to your Honor, that at the time of the alleged escape the person charged was a free man at work in Massachusetts. 1. This is admissible only under section sixth. 2. Being not a judicial tribunal, this magistracy can take no cognizance of the laws of all the States, now thirty and soon to be many more. Slavery or no slavery is always a complex question, of extreme nicety often. 3. The statutes of Virginia are not proved. There is reason why a judge in his circuit should be presumed to know them. The statutes of some States provide that the volumes printed by authority shall be taken in courts

as *prima facie* proof. But there is no such law for this. These laws, therefore, must be proved as facts. 4. So too, must the existence and seal of the court. True, that being exhibited, binds you. But that must be proved.

The complaint and warrant are illegal. They choose these rather than simple seizure, and unless this procedure knows no law, and follows no law, if they are to go by due process of law, they fail. 1. Neither the complaint nor warrant allege the fact of escape sufficiently. It is on or about a certain day. 2. There is no allegation sufficient as to the facts of service, how he is held, whether as apprentice or slave, by one as owner or as lessee, for life or years, to enable him to prepare a defense. 3. Nothing is prayed for that you can grant. The prayer is that you restore the prisoner to Suttle in Virginia. You cannot. Section 6 authorizes you to certify and him to take, and § 10 only authorizes you to deliver up. True, they ask for other relief, but this not as is said of the prayer for general relief in Courts of Equity at all next to the Lord's prayer. 4. There is no description with convenient certainty.

The nature of the evidence offered is not sufficient, assuming all they offer it is this, that within a few years, the prisoner, rendering no acts of service to the claimant, only by hearsay said to have been born of a mother, also not shown to have rendered any service to Suttle, has been said by Suttle to belong to him. This is not sufficient. Again admissions made by one claimed to be a slave are not admissible on the trial of freedom. All confessions are to be excluded. "The master has an almost unlimited control over the body and mind of his slave. The master's will is the slave's will. All his acts, all his sayings are made with a view to propitiate his master. His confessions are made, not from a love of truth, not from a sense of duty, not to speak a falsehood but to please his master, and it is in vain that his master tells him to speak the truth and conceals from him how he wishes the question answered. The slave will ascertain, or which is the same thing, think that he has ascertained, the wishes of his

master and moulds his answer accordingly. We therefore more often get the wishes of the master, or the slave's belief of his wishes, than the truth. And this is so often the case that the public justice of the country requires that they should be altogether excluded." *State v. Charity*. Such is the law as laid down by the Court of a slave state, in a trial there. Need one pause to remark with what multiplied force the principles thus stated apply here to such a case as this. The Bill of 1850 itself in § 6 expressly provides that the testimony of the persons claimed shall not be taken. Surely if any circumstances should exclude this, these are enough.

Whatever rules you choose to adopt in this case, whether in relation to your own powers, the construction of the statute the admission or the weight of evidence, they ought to be such that it would not be possible for a man actually free, one of our own citizens to be hustled off, sacrificed under the fall of the presumptions under which the laws place him for protection. But under the rule asked for by the claimant, and sometimes adopted, under the claimant's case, if you should decide it for him, it would be perfectly possible that a man free as you or I should be taken. Let the marks of a free negro be noted, let him live here or in Richmond, let a record be made as this was, without notice to him or any one, let one witness state the fact of identity, and is there any chance for the truth to be established?

Does the fact of claim strengthen it? I supposed a case of one of our citizens. Suppose the prisoner lived in Richmond and was claimed there by Suttle in fact, but in fact free. You must adopt a rule to protect that right of freedom, in whatever form it is possible he or any one set to the bar might be entitled to it.

Therefore, I say, that by the law of Virginia, in establishing title on an issue of freedom, in case of one not born before 1785, it must be proved that there is direct descent from one then held as a slave, as well as continual ownership; and also that, not only by the law of Massachusetts but by the laws of all the States, by the law of Virginia, and by the constitution,

no faith nor credit can be given to a record, which in any wise is to be used to impair one's person, estate, or liberty, unless it be proved that he was duly and fairly notified and bound to appear. Any other rule would be unjust, would open the door to obvious frauds, be destructive of liberty, deprive the citizens of the free States, as well as slaves, of their rights and immunities, and be a gross departure from the settled rules and maxims of the law.

We claim the utmost strictness of application of the settled rule of the common law as held in cases of murder (and *a fortiori* here), that the evidence must perfectly exclude any hypothesis but that claimed, and establish every fact beyond any reasonable doubt whatever.

We claim, too, that the amount of proof of one witness shall not be held enough. If it be, there can be safety for no man. It is true the common law requires but one witness in most cases. But this is *lege solutus*. Besides the law does require more in some cases. There are unanswerable reasons why in such a case as this, especially in this, more should be required. In our law the amount of testimony goes, generally, to the jury. The rule of Scripture is to be remembered, "One witness shall not rise up against a man for any iniquity. At the mouth of two or three witnesses shall the matter be established." Such is the general law of other countries. Such is the general safe custom of juries in our own.

The reason of the rule "*unius responsio non audiatur*" is the fit rule for this case, "*quia unus sibi facile constare possit.*" But if this evidence be taken it must be all taken and the prisoner is free. He is a mortgaged chattel. The mortgagee has the legal title, and is owner, and can alone reclaim. A mortgagor, even if beneficially interested could neither maintain trover for the goods mortgaged, nor assumpsit for their proceeds. He is leased; and if the right of reclamation depends on the present right of possession, the lessee alone can have that. The Bill of 1850 only authorizes the person holding, the person to whom the service is due, to reclaim;

therefore the lessee is the one to recover. The evidence proves that there was no escape. (a) The constitutional power is limited to persons "escaping from service." (b) The statute is confined to cases of escape. (c) Now they choose to show that the prisoner fell asleep on board a vessel in the bay in a slave State, and a breeze came to waft him away out on to the high seas and into the safe port of a free State. It was a boon to him. It made him free. He finds himself here without escaping. (d) No act is to be done. He is free. He has gained something, but not illegally. The master has lost, but that is his fault, in not being a better keeper. (e) This is the general law of nations. (f) This is the law of the United States, and the provision applies only strictly to *casus foederis*. In *Commonwealth v. Ames*, 18 Pick, and the case of the purser of the navy, so settled the law.

I come now to remark upon the Bill itself. On this point, too, I shall merely state my positions. 2. The counsel remarked that your Honor is bound by numerous decisions; that all the judges of the circuits and districts, and many of those before whom it had come, and many commissioners had sustained this Slave Bill as a valid law. I do not deny that there are decisions in its favor. I know them, however, to be far fewer in number than they suppose. But, sir, they cannot justly be said to be judicially obligatory on your action, closing this as *res adjudicata*. You are subordinate to no power whatever. The law has not been settled for you. Your decision upon the law is never to be drawn in question.

Nor has this broad question been reviewed by any court of highest resort in such form as to stand as authority over you save so far as it may commend itself to your judicial judgment.

In the first place this statute is a very recent one, only four years old, hardly yet trusted alone out of doors. No way is provided, but every possible way is contrived to prevent taking the judicial decision of any tribunal in the land upon it, save so far as the question may be incidentally involved in other cases, but each case must stand by itself before its own

magistrate. Again there are several classes of cases, and by far the largest part of all that have arisen, which are not of authority, to sustain this law, though they are often said to do so. One class is of those which only held a law on this subject to be constitutional, all they can or do decide is that under the Constitution, Congress may pass a law for restoration of slaves. I do not deny it; they hold that as by the law of 1793 trial by jury is taken away on the hearing, therefore that feature does not invalidate this bill. But what they decide, as in Sims' case on *habeas corpus* in Massachusetts, is that the courts cannot take one from custody of an officer of the law held under warrant from an officer having jurisdiction of the matter. Some of them, because the State tribunals cannot interfere with the process of the United States, an objection of which every lawyer at once feels the force, some because the only inquiry open to them is whether the warrant issues from one having jurisdiction, they having no more right to decide the whole to be void because some provisions of the Bill are unconstitutional, than to suppose that he will not respect the provisions of the Constitution as far as they do limit his action under the statute. Many were disposed of on purely technical points: they stand not so much as cases decided for the Bill, as attempts of the bar anywhere in every form to secure the protection of those processes for protection of human liberty which have always existed under British law. A few stand as cases decided in point, with such weight as may attach to the character of the commissioner. Some of the opinions have been written and printed in the papers. But, I must say of these few, though I promise you to speak of all with terms of such respect as I cannot feel for some, they are political cases.

In this use of the word political I attach to it a very different meaning from that I designed it should bear as applied to the other proceedings, to the causes which originate and the powers that uphold these proceedings. To all of these belong the term political in its worst sense.

But to the authority of these as precedents I apply the

term in a far different sense. With perfect respect for the tribunals whose decisions are presented to us, I must say that they were influenced by considerations besides purely legal ones; the rules of construction have been influenced by matters not of judicial cognizance, and by circumstances which, however just, however proper to be weighed, must always leave these open on questions of a mere legal character. I see well how four years since no man, no court could fail to consider that this Bill was presented not alone, that its claims to support were not of a legal character, but that this bill stood as part of a system of grants and concessions, the best to be attained, to be acted on with a view to the political relations not of the parties but of the country. Who could help feeling that the first question was one of peace?

Of course, sir, I do not say that a judicial authority on a statute is to be changed because all is changed now. Just the reverse. I say that any that was influenced by such considerations at all is to be scrutinized accordingly. And we cannot fail to notice what is stated distinctly in more than one opinion as the chief reason for recognizing this statute as a valid law, or valid in its chief provisions, and to remark of it that it is not a matter of legal cognizance at all in any form.

Lord Clarendon, himself a lawyer, said that in the cases of the ship-money the judges declared as law from the bench what every man in the hall knew not to be law. I apply no such remark sweepingly to all cases. To many I know it is not just. Many of the cases a lawyer knows must have been decided as they were for reasons to which I have alluded, cases involving the question only collaterally, cases disposed of on different grounds. Many of the dicta in those cases, for us as well as against, must be forgotten. But with due regard to this great fact, to the fact that this Bill is of such recent date, that there have been conflicting decisions and dicta upon it and on various parts of it, that the least that can be said is that the sense of the bar as well as of the country is divided, this can hardly be held to be a matter settled by con-



clusive judicial precedent. If it be not too late, it is fit to apply the maxim, *melius recurrere quam male currere*.

It is to be noted that this Bill has been sustained on the authority of the law of 1793. That reason has had weight to which the facts give it no claim. It is true, that the existence of the law of 1793 upon the statute book is a just legal reason for recognizing this bill, in so far as it involves no new principles, as a valid law. But no farther.

Let it be admitted then, for this debate, that the law of 1793 was constitutional, that that did not provide for a trial by jury. Still not a step is taken in the argument that would sustain this bill. This bill has new features, and what they are we see and feel, and how momentous they are is best to be judged from the fact that they were pressed, even to the hazard of peace, to the statute book and are to be forced, in spite of every consideration whatsoever, to judgment. The law of 1793 did not provide for trial by jury, it is true, but it did not prevent it. That set one man to judge, but it did not prevent him from a judgment on the rules of evidence and the facts in the case. This presents to you a paper for which no one is responsible, blinds your eyes to the truth, although it has not yet been judicially settled, says you shall not inquire into it, says you must try, but summarily, and ties your hands to a single act. That law, too, left the issue in such a position, that if the party chose he could have his trial secured before the magistrate and secured elsewhere. This cuts off any legal process. The writ *de homine replegiando*, which we had thought to be part of the common law, to be matter of common right to exist under the act of 1789, is held to have no longer any existence. The *habeas corpus* is suspended. Coke would think all this required a new Petition of Rights. He might have thought that such a sacrifice of rights, even in this anomalous procedure, could be withstood on the hallowed principles of the English law, and defended against under the constitution of the country. This Bill goes beyond the statute of 1793 in the mode of instituting, the time of prosecuting, the mode of proving, the mode of conducting the trial, and the mode of enforcing the decision.

I will now state briefly the positions on which, if you do not feel bound to execute this as a settled law in all its details, I claim that this Bill of 1850 ought to be declared unconstitutional. It undertakes to give to the Virginia court judicial power. It gives to a record of the Virginia court an effect not warranted by the constitution. If the paper offered be viewed as evidence merely, the constitution nowhere gives any power to make any such proofs.

Article 3, section 1 has been considered, and, of course, cannot confer it. It cannot exist as incident to the power of reclamation, because however anomalous in form, that is limited by the rights of citizens, as declared in the provisions presently to be referred to. It confers judicial power on you. This position has never been answered; the knot is only cut. Justly analyzed, all the objections to this that I have heard, do not relate to your function. It cannot be denied that all the essential elements of a judgment are involved in it. They all relate, not to the powers you possess, but to the form of their exercise. In such a view, I agree this is not a judicial proceeding.

It not only does not secure trial by jury as the Act of 1793 did not, but it practically prevents the possibility of securing it or of resorting to any form of process for relief. It violates the provision of Article 4 of the Amendments, which guarantees persons against unreasonable seizures. It violates that of Article 5, that no one shall be deprived of liberty without due process of law, and also Articles 6 and 7. This is not a power that is delegated to Congress. It goes to defeat the intent of the Constitution, and is contrary to the spirit of our laws.

For these reasons the claimant shows no claim to a certificate; but the charge of escape is not true. The title is not his; he ought not to have his claim allowed. If such a case stood alone, we feel that it ought to be dismissed.

But the prisoner has an answer to it, a case of his own. It can be stated in a word. The complaint alleges, the record offered only proves, the only witness called testifies to an

escape on the 24th day of March last, from Richmond. The witness swears clearly and positively that he saw this prisoner in Richmond on the 19th day of March. We shall call a number of witnesses to show, fixing, as I think, the man and the time beyond question, that the prisoner was in Boston on the 1st of March last, and has been here ever since up to the time of this seizure.

This is our defense. Thus do we answer the case of the claimant, and hold that it must be tried by these rules. Yet I feel that in these cases no one knows what ground he stands upon. Common justice, therefore, demands that you give us the benefit of every doubt on the questions of law, and on the issues of fact.

You will, I know, not consider me as expressing the slightest want of confidence or disrespect. I say frankly and publicly, I am glad this case is not before others. But, sir, we know not whom to trust. Who knows that he can trust himself? What influences may be about you—what may be your opinions—I know not. But this I do feel, to the peril of the prisoner, that a man must be more than mortal if he can close his eyes and ears to a thousand things that reach them where you sit, all aimed at the destruction of the prisoner.

Be sure, therefore, that you make no error in your law. Be sure that your reason and judgment are beyond all danger of bias. Be sure that you make no mistake in fact, for you sit in judgment on this cause, with powers such as are nowhere else intrusted to mortal man in the civilized world, and your responsibilities correspond to them.

In our courts, a criminal has the benefit of every error in law, and the benefit of every doubt, with the jury. The prisoner at the bar can rightly, because of your unlimited powers, claim of you, as a matter of honor and magnanimity, the most liberal measure of fairness that he could ever ask at the hands of Court or jury, and demand of you to see that you justly give to him all he could secure at their hands by any form of legal protection.

## THE EVIDENCE FOR THE DEFENSE.

*William Jones* (colored). Reside in South Boston; am a laborer; know Burns; saw him first on Washington street, first day of March; talked with him half an hour; employed him to go to work on 4th March in the Mattapan works at South Boston; worked at cleaning windows; he worked with me there five days; the day I saw him I made a minute of it in Mr. Russell's shop and asked Mr. Russell to put it down on my book; keep a memorandum; can't write myself; the entries were made in the book by Mr. Russell; agreed to give him eight cents a window, and when he got through with the windows gave him a dollar and a half; he said I hadn't settled up with him right; he went to the clerk about it; have that memorandum book (it was handed to counsel); on referring to this book am able to state that I did go with him at this time to South Boston to work.

*Cross-examined.* Never saw Burns before I saw him on Washington street; he spoke to me first; don't recollect the day of the week; about the first of the week; saw him just below the Commonwealth office; he was alone; it was between eleven and twelve o'clock; he had on lightish pants; can't describe his dress more particularly; he had on lightish coat and cap; he asked me if I knew of any one that wanted a man to work in a store; said, What can you do? he said he could do most any thing; took him from there to Mr. Russell's shop, and went from there to Mr. Favor's shop; then to an

apothecary shop under the U. S. Hotel; went there to fool; next to Mr. Maddox's in Essex street; keeps a clothing store; had nothing else to do but walk round the city; after leaving Maddox's came down Washington street; went into Mr. Bell's, dancing master; then went down Washington to Kneeland street, and then went home at South Boston; Burns went with me; it was night when we arrived home; eat but one meal a day, and have no particular hour for that; don't recollect whether it snowed or rained; he stayed with me that night, the next night, and the next, and the next; went to the Mattapan Works; saw Mr. Sawyer, the boss; talked with him about the job; Burns was with me all the time; went back to the Mattapan Works and commenced work at one, till night; Burns was with me all the time; he helped me clean windows; next morning went back to work with me; worked all day; cleaned windows; after finishing at the Mattapan Works went to City Hall to see Mr. Gould; Burns went with me; there was no work to be done and we went home then; on the 18th March went to work at City Hall; he was with me there about three times; he made fire under the boiler for me; left him here on the morning of 18th; never put eyes on him again until Sunday morning, when I saw him looking out of the window of the Court House; his head was out of the window; had before called on Col. Suttle, who told me Burns escaped on the

24th; had never seen Colonel Suttle any where else; might have seen him in Virginia, but didn't know him on Thursday; heard there was a man arrested; stayed at the Court House all night Friday night, me and a watchman together, protecting the city property; nobody spoke to be about being a witness here; came here because I saw this man looking out of the winow; have had no conversation with anybody about this matter until yesterday; mentioned it to many; came here this morning with Mr. Lawton; was at the meeting in Faneuil Hall, and came from there when the meeting broke up; stood in Court street until the mob left the square and then went up the square to protect the city property; first heard him called Anthony Burns on Thursday; called him John and Jack, or any short name that came handy; spoke to Mr. Carlton in the Marshal's office; didn't tell him that Burns belonged to Col. Suttle; applied to the Marshal for a permit to see Burns, and he said he wouldn't let his master see him; didn't say if I saw him I would advise him to go back.

*George H. Drew.* Was book-keeper at the Mattapan Works until the 18th of this month; knew Jones was employed about the first of March to wash windows at the Mattapan Works; had not seen prisoner from the time he worked there until I saw him here yesterday, and recognized him; saw him before with Jones when Jones came to get a job, and I referred him to Mr. Sanger; looked at this man and asked Jones if he was his brother, and he said, All men are my brothers: about the first of

March, after I settled with Jones, Burns came to me and asked me how much I paid Jones; don't recollect the number of days they worked; have no doubt of the identity of the man; recognize him by his general appearance.

*Cross-examined.* Saw him twice to notice him particularly; one of these times was when he came to ask how much I paid Jones, and the other when they came to see about the job; somebody sent for me yesterday noon, saying I might be wanted as a witness here; was brought here yesterday to look at Burns; was outside the Court House yesterday morning; never noticed the scar on his hand. The way in which I fixed the day of Burns being at work at the Mattapan Works is by the entry in the cash book; paid Jones \$1.50 on 4th March, and made a final settlement with him on the 28th, paying him in all \$33.50; the work had been finished some days when I settled with him; the first work he did was cleaning the windows.

*James F. Whittemore.* Am a machinist with the Mattapan Works; am a member of the City Council; went West some time in March; returned 8th of March; know the man at the bar; saw him on the morning of the 8th and 9th March, at our shop at South Boston, cleaning windows with Jones; noticed the mark on his cheek, and also the mark on his right hand.

*Cross-examined.* Know it was the 8th of March when I returned because I left Philadelphia on the 6th; called no attention to the marks at that time; Mr. Drew was in the room at the time with others; the firm failed in the

month of April; came in to see if I could identify him; no one asked me to come, something was said about his being the same man who was employed by Jones to clean windows; saw Burns and immediately stated he was the man;.

To *Mr. Dana*. Am lieutenant of the Pulaski Guards; have no particular interest in this case; do not lie under the imputation of being a Free Soiler or Abolitionist; I am a hunker Whig.

*Stephen Maddox* (colored). Kept a clothing store in March; know Burns; saw him at my store in March with Jones, about noon; fix the time by Jones asking of me if I had any work; stated that my outside work didn't commence for two months, the first of May, that is all I can fix the time by; particularly noticed the mark on Burns' left cheek; I didn't see him again till I saw him today at 10 o'clock in this room; recognized him myself without his being pointed out to me.

*William C. Culver*. Am a blacksmith; was employed by the Mattapan Company in March; recollect Jones and his men being there cleaning windows; it was prior to the time we changed our hours of work, which was the first of April.

*John Favor*. Reside in Boston; am a carpenter; saw Jones in my shop in March; he had a colored man with him; didn't see the man who was with Jones again until yesterday; thought I could recognize him if I saw him; when I came into court recognized him as the man who came with Jones.

*H. N. Gilman*. In March worked for the Mattapan Company; remember Jones working

there, and having a colored man with him; noticed a scar upon his face; saw him in the court this morning; Jones asked me yesterday if I didn't recollect the man who was in his employ last spring; I recognized him; he is the person who was at work for the Mattapan Company in March.

*Cross-examined*. Was a teamster for the Mattapan Iron Works; saw Burns working there four or five days; perhaps half an hour in all; left their employ the 13th of April; we were paid off the first of the month, and it was near pay day that I saw him; feel sure that it was done before the middle of March.

*Rufus A. Putnam*. Am a machinist of the Mattapan Company; remember Jones and a colored man working there; fix the time by comencing a job at the time Jones was at work there, and also by the change of hours for commencing and ending work.

*Cross-examined*. Took the job first part of March, and it was then that Jones was there; it was before the 10th of March; have memoranda which enables me to fix the time will swear that it was before the 6th of March; went to Mr. Ellis' office this morning by request of Dr. Drew; went in with Mr. Whittemore.

*Horace W. Brown*. Am a police officer; have seen that man before; he was cleaning windows at the Mattapan Works, South Boston; was at work there as carpenter; left work there the 20th of March; saw Jones and Burns at work there some week or ten days before I left; have not the slightest doubt about the man.

*Cross-examined.* My attention was first called to this matter this afternoon; never spoke to

any one about it until I saw the prisoner this afternoon; came here of my own accord.

#### REBUTTING EVIDENCE.

*Cyrus Gould.* Did not hear Jones' testimony this morning; was about the City Hall the 18th of March; have charge of the building; Jones worked there on 10th two or three hours; he worked for me on the 16th and 17th of March; he was cleaning up; did not see Burns with Jones there at any time; there was no man working with him; two women were working with him.

*Erastus B. Gould.* Reside in Boston; have had care of the city building for two years; know Jones; employed him to work for me on that building on the 26th of March and at no other time in March; he had two women working with him; but no man; never saw Burns about the building; am there only mornings and nights.

*Benj. True.* Have conversed with Burns within a day of two.

*Mr. Ellis* objected to the evidence.

*Mr. Parker* proposed to show by this witness, by Burns' admission, that he came to Boston on the 19th of March.

*Mr. Dana* objected that the admission of the man under arrest should not be received at all and because it was not rebutting testimony. The evidence introduced that Burns was here on the first of March was simply contradictory to the testimony for the claimant that Burns was in Virginia on the 20th of March, and they are now simply reinforcing their former testimony.

*Mr. Thomas* argued that the ev-

idence alluded to by Mr. Brent was simply to prove the identity of Burns and not to establish the fact of his being in Virginia on the 20th. The defense proposes to prove an alibi, and we introduce this evidence to control their evidence sustaining the alibi.

The COURT ruled that the testimony was admissible, but gave the counsel notice that if he changed his mind subsequently, before the arguments, he would inform them.

*Mr. True.* This conversation was every day since he has been here; last Friday or Saturday had conversation with him about how long he had been here; it was up stairs in the place where he is kept, it was in the morning I think; was there as Deputy Marshal in charge of Burns.

*Mr. Ellis* objected to the evidence on account of the relation which the witness bore to Burns; that confessions made to him were made under intimidation, and therefore should not be received.

The evidence was admitted.

*Mr. True.* Am a constable of Boston; first saw prisoner the night of his arrest, in the Marshal's office; found five or six men there; two of them are sitting beside him now; one is Mr. Pray; Mr. Butman was one; another was Moses G. Clark; Mr. Coolidge was there, and Mr. Page; my instructions were to stay there and see that no one came except by the direction of the Marshal; have been there



since; was armed with a sword and pistol Friday night; the Marshal and others came into the room Wednesday night; there was a good deal of talk between the officers and Burns; don't recollect any one saying he must go back; he first appeared terrified; never threatened him or held out any promises to him; we endeavored to treat him well; gave him newspapers, oranges, oyster stews and candy when he wished them; he can read and write.

*Mr. Ellis* objected, in view of this evidence, that the admissions of Burns should not be received, because it was established by it

that they were not voluntary, but were given under circumstances which amounted to intimidation; and the whole circumstances since had been such as to increase his intimidation.

*Mr. Thomas* argued that the ground of intimidation had not been made out, and the Court ruled that the evidence was admissible.

*Mr. True.* The conversation was on Friday and Saturday; he said he had been here about two months, perhaps a little short of that; said nothing else about the time he had been here; he said he had been in Richmond, Virginia, before that time.

MR. DANA, FOR THE PRISONER.

*Mr. Dana.* I congratulate you, sir, that your labors, so anxious and painful, are drawing to a close. I congratulate the Commonwealth of Massachusetts, that at length, in due time, by leave of the Marshal of the United States and the District Attorney of the United States, first had and obtained therefor, her courts may be reopened, and her judges, suitors and witnesses may pass and repass without being obliged to satisfy hirelings of the United States Marshal and bayoneted foreigners, clothed in the uniform of our army and navy, that they have a right to be there. I congratulate the City of Boston, that her peace here is no longer to be in danger. Yet I cannot but admit that while her peace here is in some danger, the peace of all other parts of the city has never been so safe as while the Marshal has had his posse of specials in this court house. Why, sir, people have not felt it necessary to lock their doors at night, the brothels are tenanted only by women; fighting dogs and racing horses have been unemployed, and Ann street and its alleys and cellars show signs of a coming millennium.

I congratulate, too, the Government of the United States, that its legal representative can return to his appropriate

duties, and that his sedulous presence will no longer be needed here in a private civil suit, for the purpose of intimidation, a purpose which his effort the day before yesterday showed every desire to effect, which, although it did not influence this Court in the least, I deeply regret your Honor did not put down at once, and bring to bear upon him the judicial power of this tribunal. I congratulate the Marshal of the United States that the ordinary respectability of his character is no longer to be in danger from the character of the associates he is obliged to call about him. I congratulate the officers of the army and navy that they can be relieved from this service, which as gentlemen and soldiers surely they despise, and can draw off their non-commissioned officers and privates, both drunk and sober, from this fortified slave-pen, to the custody of the forts and fleets of our country, which have been left in peril, that this great Republic might add to its glories the trophies of one more captured slave.

I offer these congratulations in the belief that the decision of your Honor will restore to freedom this man, the prisoner at the bar, whom fraud and violence found a week ago a free man on the soil of Massachusetts. But rather than that your decision should consign him to perpetual bondage, I would say—let this session never break up! Let us sit here to the end of that man's life, or to the end of ours. But, assured that your Honor will carry through this trial the presumption which you recognized in the outset, that this man is free until he is proved a slave, we look with confidence to a better termination.

Sir Matthew Hale said it was better that nine guilty men should escape than that one innocent man should suffer. This maxim has been approved by all jurists and statesmen from that day to this. It was applied to a case of murder, where one man's life was on one side and the interest of an entire community on the other. How much more should it be applied to a case like this, where on the one side is something dearer than life, and on the other no public interest whatever, but only the value of a few hundred pieces of

silver which the claimant himself, when offered to him, refused to receive. It is not by rhetoric, but in human nature, by the judgment of mankind, that liberty is dearer than life. Men of honor set their lives at a pin's fee on a point of etiquette. Men peril it for pleasure, for glory, for gain, for curiosity, and throw it away to escape poverty, disgrace or despair. Men have sought for death, and digged for it as for hid treasure. But when do men seek for slavery, for captivity? I have never been one of those who think human life the highest thing. I believe there are things more sacred than life. Therefore I believe men may sacrifice their own lives, and the community, sometimes the single man, may take the lives of others. Such is the estimation in which it is held by all mankind. No! there are some in my sight now who care nothing for freedom, whose sympathies all go for despotism; but thank God they are few and growing less. Such is the estimate of life compared with freedom, which the common opinion of mankind and the common experience of mankind has placed upon it. Here is a question of a few despised pieces of silver on the one hand, and on the other perpetual bondage of a man, from early manhood to an early or late grave, and the bondage of the fruit of his body forever. We have a right, then, to expect from your Honor a strict adherence to the rule that this man is free until he is proved a slave beyond every reasonable doubt, every intelligent abiding misgiving proved by evidence of the strictest character, after a rigid compliance with every form of law which statute, usage, precedent has thrown about the accused as a protection.

We have before us a free man. Col. Suttle says there was a man in Virginia named Anthony Burns; that that man is a slave by the law of Virginia; that he is his slave, owing service and labor to him; that he escaped from Virginia into this State, and that the prisoner at the bar is that Anthony Burns. He says all this. Let him prove it all! Let him fail in one point, let him fall short the width of a spider's thread, in the proof of all his horrid category, and the man goes free.

Granted that all he says about his slave in Virginia be true—is this the man?

On the point of personal identity, the most frequent, the most extraordinary, the most notorious, and sometimes the most fatal mistakes have been made, in all ages. One of the earliest and most pathetic narratives of Holy Writ is that of the patriarch, cautious, anxious, crying again and again, "Art thou my very son Esau?" and by a fatal error, reversing a birth-right, with consequences to be felt to the end of time. You know, Sir—they are matters of common knowledge—that a mother has taken to her bosom a stranger for an only son, a few years absent at sea. Whole families and whole villages have been deceived and perplexed in the form and face of one they have known from a child. You have found it difficult to recognize your own classmates, at the age of three or four and twenty, who left you in their sophomore year. Brothers have mistaken brothers. We have the Comedy of Errors. Let us have no Tragedy of Errors, here! The first case under this statute, the case of Gibson, in Philadelphia, was a mistake. He was sworn to, and the commissioner was perfectly satisfied, and sent him to Maryland. Against the will of the claimant, from the humanity of the Marshal, who had his doubts, and would not leave the man at the State line, but went with him to the threshold of the door of the master's house, the mistake was discovered before it was too late. In the late case of Freeman, in Indiana, the claimant himself was present, and the testimony was entirely satisfactory, and he was remanded; but it turned out a mistake, and he has recovered, I am told, \$2,000 in damages. These are the mistakes discovered. But who can tell over to you the undiscovered mistakes? the numbers who have been hurried off by some accidental resemblance of scars or cuts, or height, and fallen as drops, undistinguishable, into the black ocean of slavery?

Make a mistake here, and it will probably be irremediable. The man they seek has never lived under Col. Suttle's roof since he was a boy. He has always been leased out. The man you send away would be sold. He would never see the

light of a Virginia sun. He would be sold at the first block, to perish after his few years of unwonted service, on the cotton fields or sugar fields of Louisiana and Arkansas. Let us have, then, no chance for a mistake, no doubt, no misgiving!

What, then, is the evidence? They have but one witness, and one piece of paper. The paper cannot identify, and the proof of identity hangs on the testimony of one man. It all hangs by one thread. That man is Mr. Brent. Of him, neither you nor I, Sir, know anything. He tells us he is engaged in the grocery business and lives in Richmond, Virginia. Beyond this we know nothing, good or bad. He knew Burns when a boy, running about at Col. Suttle's, too young to labor. He next hired him himself in 1846 and '47. This was seven years ago. He says Burns is now 23 or 24 years of age. He was then 16 or 17 years old; he is now a matured man.

Since that time he has leased him, as agent for Col. Suttle, but does not seem to have been brought in close contact with him, or to have done more than occasionally meet him in the streets. The record they bring here describes only a dark complexioned man. The prisoner at the bar is a full blooded negro. Dark complexions are not uncommon here, and more common in Virginia. The record does not show to which of the great primal divisions of the human race the fugitive belongs. It might as well have omitted the sex of the fugitive. It says he has a scar on one of his cheeks. The prisoner has, on his right cheek, a brand or burn nearly as wide as the palm of a man's hand. It says he has a scar on his right hand. A scar! The prisoner's right hand is broken and a bone stands out from the back of it, a hump an inch high, and it hangs almost useless from the wrist, with a huge scar or gash covering half its surface. Now, Sir, this broken hand, this hump of bone in the midst, is the most noticeable thing possible in the identifying of a slave. His right hand is the chief property his master has in him. It is the chief point of observation and recollection. If that hand has lost its cunning or its power, no

man hears it so soon and remembers it so well as the master. Now, it is extraordinary, Sir, that neither the record nor Mr. Brent say any thing about the most noticeable thing in the man. Nowhere in Mr. Brent's testimony does he allude to it, but only speaks of a cut. The truth is, please your Honor, one of two things is certain here. If Mr. Brent does know intimately Anthony Burns, of Richmond, and has described him as fully as he can, the prisoner is not the man. Anthony Burns was missing, and Mr. Brent hurried down to Alexandria to tell Col. Suttle. The record is made up, which is probably still only Mr. Brent on paper. Mr. Brent comes here with Col. Suttle, as his friend. Emissaries are sent out with the description in their hand, and they find a negro, with a huge brand on his cheek and a broken and cut hand, and that is near enough for catchers, paid by the job, to a "dark complexioned man," with "a scar on the cheek and on the right hand." Mr. Brent knows, and does not swear otherwise, that the Anthony Burns he means had only a scar or cut, and he distinctly said "no other mark." But still he swears to the man. Identification is matter of opinion. Opinion is influenced by the temper, and motive, and frame of mind. Remember, Sir, the state of political excitement at this moment. Remember the state of feeling between North and South; the contest between the slave power and the free power. Remember that this case is made a State issue by Virginia, a national question by the Executive. Reflect that every reading man in Virginia, with all the pride of the Old Dominion aroused in him, is turning his eyes to the result of this issue. No man could be more liable to bias than a Virginian, testifying in Massachusetts, at this moment, on such an issue, with every powerful and controlling motive on earth enlisted for success.

Take the other supposition, which may be the true one, that Mr. Brent does not know Anthony Burns particularly well. He goes down to Alexandria to tell Col. Suttle that he has escaped. The record is made up there, as best they can. Mr. Brent did not go there as a witness to identify, and

does the best he can. He does not recollect whether he is a negro or mulatto, or of what shade, so he calls him "dark complexioned," and he can speak only of a scar, he does not know on which cheek, and of a scar on the hand. Beyond this, he is uncertain. If this is so, your Honor can have no satisfying description of Anthony Burns, the slave of Col. Suttle, if such a person there be.

But there is, fortunately, one fact, of which Mr. Brent is sure. He knows that he saw this Anthony Burns in Richmond, Virginia, on the 20th day of March last, and that he disappeared from there on the 24th. To this fact, he testifies unequivocally. After all the evidence is put in on our side to show that the prisoner was in Boston on the 1st and 5th of March, he does not go back to the stand to correct an error, or to say that he may have been mistaken, or that he meant only to say that it was about the 20th and 24th. He persists in his positive testimony, and I have no doubt he is right and honest in doing so. He did see Anthony Burns in Richmond, Va., on the 20th day of March, and Anthony Burns was first missing from there on the 24th. But the prisoner was in Boston, earning an honest livelihood by the work of his hands, through the entire month of March, from the 1st day forward. Of this your Honor cannot, on the proofs, entertain a reasonable doubt.

William Jones, a colored man well known in this city, who works for the city, and for the Mattapan Company, and for others, and entirely unimpeached, testifies that on the first day of March he met the prisoner in Washington street. He knows the man. He tells you of all the places he went to with him to find work for him to do. He received him into his house as a boarder on that day. On the 5th day of March they began working together at the Mattapan Works, in South Boston, cleaning windows and whitewashing, and worked for five or six days. Then, on the 18th they worked at the City Building. Then Burns left him for another employ. Jones cannot be mistaken as to the identity. The only question would be as to the truth of his story. It is a truth or it is a pure and sheer fabrication. I saw at once, and as



every one must have felt, that the story so full of details, with such minuteness of dates and names and places, must either stand impregnable or be shattered to pieces. The fullest test had been tried. The other side has had a day in which to follow up the points of Jones' diary, and discover his errors and falsehoods. But he is corroborated in every point.

Mr. Drew, the clerk of the Mattapan Works, says that Jones and the prisoner cleaned the windows and did the whitewashing of that establishment from the 5th to the 10th of March. He has an entry of the first day's payment in his card book on the 5th. Various other payments were made at intervals until the 28th, when a final settlement was had. This settlement included Jones' work in painting which went on after the window cleaning was done. He says that after he settled with Jones, the prisoner came to him to know how much he paid Jones for his work, and he told him. He says he heard that he was wanted as a witness, and thought it a joke, and came down here and was told that the man claimed as a slave had worked for him. He came into the room and recognized him at once, and the prisoner recognized the witness. His testimony corroborates Jones in another particular. Jones says he remembers the dates from the fact of a dispute between him and the prisoner, which led him to ask Mr. Russell to enter the dates of the prisoner's coming to his house in his pocket book, as Jones himself does not write. This pocket book was produced by Jones, and Mr. Russell who made the entries, was sworn by us and has been here.

Mr. Whittemore is a member of the City Council and was one of the directors of the Mattapan Co. He made a journey to the West, from which he returned on the 8th day of March. On that day or the next, he went to the works, where his counting room is. The prisoner and Jones were cleaning the windows of the counting room. He noticed the peculiar condition of his hand, and the mark on his cheek. He is sure of the man and of the date. He heard at the armory of the Pulaski Guards, of which he is lieutenant,

of Jones' testimony, and said to himself and others, "I shall know that man," and came here to see. As soon as he saw him he knew him.

Now, Sir, Mr. Whittemore, in answer to a question from me, whether he was under the odium of being either a Free Soiler or an Abolitionist, said that he was a Hunker Whig. The counsel thought this an irrelevant question. I told him I thought it vital. Not that the political relations of Mr. Whittemore could affect your Honor's mind, but that it shows he has no bias on our side. Moreover, I am anxious not only that your Honor should believe our evidence, but that the public should justify you in so doing. And there is no fear but that the press and the public mind will be perfectly at ease if it knows that your Honor's judgment is founded even in part, in a fugitive slave case, in favor of the fugitive, on the testimony of a man who has such a status *illaesae existimationis*, as a Hunker Whig, who is eke a train-band captain in a corps under arms!

Jones says that they went to work every day at 7 o'clock. Mr. Culver, the foreman, and Mr. Putnam, a machinist, and Mr. Gilman, the teamster, of the works, say that the hour of work was changed to half past six a. m., on the first of April. They also are quite sure, from the course of the work and their general recollection, that it was done early in March. Mr. Gilman has an additional recollection that it was a few days after pay day, which was March 1st. Mr. Putnam has a memorandum which shows that he began his own work there on the 3d or 4th day of March, and he says Jones began cleaning the windows a few days after.

Then Mr. Brown, one of the city police now on duty, testified that on entering the court room he recognized the prisoner at once. He has no doubt of him. He first saw him at the Mattapan Works cleaning windows with Jones. He himself left off his work there on the 20th of March, as his memorandum and recollection show. About ten days before he left off he changed his work to a new building in which there were no windows. The windows were cleaned in the old building and of course before the 10th of March.

His attention was called to the man at the time. He spoke to him, and asked him to wash a certain window.

This is the testimony as to the Mattapan Works. Is it not conclusive? It is clear that the work was done there by Jones and a colored man from the 5th to the 10th of March. Jones worked there at no other time. This man was the prisoner. On a question of identity, numbers are every thing. One man may mistake, by accident, by design or bias. His sight may be poor, his observation imperfect, his opportunities slight, his recollection of faces not vivid. But if six or eight men agree on identity, the evidence has more than six or eight times the force of one man's opinion. Each man has his own mode and means and habits of observation and recollection. One observes one thing, and another another thing. One makes this combination and association, and another that. One sees him in one light or expression, or position, or action, and another in another. One remembers a look, another a tone, another the gait, another the gesture. Now if a considerable number of these independent observers combine upon the same man, the chances of mistake are lessened to an indefinite degree. What other man could answer so many conditions, presented in so various ways. On the point of the time and place, too, each of those witnesses is an independent observer. These are not links in one chain, each depending on another. They are separate rays from separate sources, settling on one point.

Here we have the testimony of Mr. Favor, whom I know you have noticed as a respectable man, who remembers Jones bringing the prisoner to his shop in Lincoln street to find work, very early in March; and Stephen Maddox, a tailor, says that Jones brought the prisoner to his shop to find work. He remembers telling him that he should have no work for him for two months, as his outdoor work, cleaning, etc., did not begin so as to require help before the first of May. This is the natural observation, and it is as natural he should remember it. A poor man was applying for work. He was obliged to put him off, and, to show his sincerity, he explained to him the course of his work. He was obliged

to sentence him to disappointment and delay for two months. He remembered it. It would be remembered by a kindly man, under such circumstances.

The attempt at contradiction as to the City Buildings fails. Mr. Gould confirms Jones' account that he worked there on the 18th or 17th of March. He does not recollect the prisoner being with him; but he admits that he was there only twice a day, and Jones said that the prisoner was there only an hour or so, to help him a little, without pay.

Mr. Brent puts his case resolutely and unequivocally on the ground that the man he means was in Richmond up to the 20th. We have proved that the prisoner was here on the 1st and 5th and 10th and 18th. This is inconsistent with the claimant's case. This witness does not pretend a mistake or doubt. They cannot pretend one in argument, because he has been in court all the while, and is not recalled.

If we had the burden of proof, should we not have met it? How much more then are we entitled to prevail, where we have only to shake the claimant's case by showing that it is left in reasonable doubt?

Whatever confidence I may have in this position, I must not peril the cause of my client by any overwhelming confidence in my own judgment. I must therefore call your Honor's attention to the other points of our defense.

Assuming now, for the purpose of further inquiry, that all our testimony is thrown out, and let the case rest on their evidence alone. It is incumbent on them to show that the prisoner owes service and labor to Col. Suttle, by the laws of Virginia, and that he escaped from that State into Massachusetts.

Does he owe service and labor to Col. Suttle?

The claimant, perhaps, will say that the record is conclusive on the facts of slavery and escape, and that the only point open is that of identity. That is so if he adopts the proper mode of proceeding to make it so. Section 10 of the Fugitive Slave Law provides a certain mode of proceeding, anomalous, in violation of all rules of common law, common

right and common reason, a proceeding that has not its precedent, so far as I can learn, in the legislation of any Christian nation, therefore to be strictly construed, and not to be availed of unless strictly followed. It provides that the questions of slavery and escape shall be tried, *ex parte*, in the State from which the man escaped, and not in the State where he is found. The hearing and judgment are to be there and not here. This judgment being authenticated is to be produced here, and the Commissioner here has only jurisdiction to inquire whether the person arrested is the person named in the judgment. He cannot go into the matters there decided, but only see if the record fits the man.

Section 6 of the Statute provides an entirely different proceeding. It authorizes the Court here to try the questions of slavery and escape, as well as identity, and requires them to be tried by evidence taken here, or certified from the State from which he escaped, or both. It is not pretended that this transcript of a record is such evidence. Now, which proceeding are we under? Doubtless under that provided in the 6th section. The claimant introduces Mr. Brent, and by him offers evidence to prove the fact of slavery, the title of Col. Suttle, and the escape. He goes fully into these points. This was not offered as a mode of proving identity. The identity was proved first, and then the other evidence was put in. It was professedly to prove title and escape. Parts of it were objected to as not competent to prove those points, and advocated as competent for that purpose, and on no other ground, and ruled in or ruled out on that ground. They introduced evidence tending to show that a certain negro woman was a slave of Col. Suttle, and that that woman was the mother of Burns, and that his brothers and sisters are slaves, and they introduced evidence tending to show an escape, in the same manner. After that, they offered the record and we objected to it, and it was received *de bene esse*, and its admissibility is now to be decided upon.

We say that the two proceedings cannot be combined. The jurisdiction and duties of the magistrate are different in the

two cases. The rights of parties are different. It is evident that the statute makes them different proceedings, and not merely different proofs, for they are not merely put into separate sections, but each section contains a repetition of the foundation of a proceeding, its progress, the decision and execution, and each provides for the receiving of evidence of identity. There is a different form of certificate required in the two cases. On the face of the statute they are two proceedings. You cannot combine *scire facias* on a record with a count in *assumpsit*, proving the original debt by parol. You cannot, on the *voir dire* examine the party himself, and prove his interest by other evidence also.

Even if the record can be combined with parol proof, it can hardly be contended that it is conclusive against the proof the claimant himself puts with it. When the statute says it is conclusive, it means that the defendant is not admitted to contradict it by proof. But if the claimant introduces proof which overthrows its allegations, can he contend that it is conclusive? If he proves that the right to the certificate is in Millspaugh, and not in Col. Suttle, can he fall back on his record and claim a certificate for Col. Suttle? If he proves that the man did not escape, can he fall back on his record, and claim a certificate for an escaped fugitive?

I pray your Honor, earnestly, to confine this record—the venomous beast that carries the poison to life and liberty and hope in its fangs—to confine it to the straightest limits. It deserves a blow at the hand of every man who meets it.

If your Honor considers the record as admissible, in other respects, and conclusive if admitted, we have objections to offer to it from the nature of its contents and form.

In the first place, it does not purport to be a “record of the matters proved.” It is all in the way of recital. It says, “On the application of Chas. F. Suttle, who this day appeared and made satisfactory proof that, etc., it is ordered that the matters so proved and set forth be entered on the records of this Court,” and there it ends. Well, have they entered the facts on the record? If so, I should like to see the entry. Where

is the transcript of that record? All we have here is the porch to the building, with a superscription reciting what is to be found within. We are entitled to the building and its contents.

In the next place, the record does not, as I have already once observed, set forth a description of the person "with such convenient certainty as may be." It does not tell you whether he is a negro, a mulatto, a white or an Indian. The rest of the description would be full enough, if it fitted the prisoner at the bar. That goes, to be sure, to the point of identity. But let me remind you, Sir, here, that a scar is not a large brand, and that a scar is no adequate description of the state or appearance of that man's hand.

The record is also objectionable, because it does not allege that he escaped into another State. Unless he has escaped into another State, the *casus foederis* does not arise. And how is your Honor to know that he did escape into another State. The only evidence you can legally receive is on the point of identity. If you proceed strictly by the record, you are without evidence of one great fact necessary to call into action the constitutional powers.

We have great confidence, please your Honor, that the record will be excluded on one or more of these points; or that, if admitted, we may control it by the claimant's own testimony.

Does he then, by the claimant's own evidence, owe to Col. Suttle service and labor?

Their evidence shows conclusively that he does not. Mr. Brent tells us that Col. Suttle made a lease of him to a Mr. Millspaugh of Richmond, in January last, and that he was in the service of Mr. Millspaugh when he disappeared. It is the ordinary case of a lease of a chattel. The lessee has the temporary property and control. The reversioner has no right to interfere with the possession or direction of the chattel during the lease. This proceeding has always been defended, by those who hold it to be constitutional, on the ground that it merely secures and affects the temporary control of the slave,



stitute these proceedings, has done nothing about them. They do not produce even his affidavit.

In the next place, setting aside the difficulty about the lease, and the mortgage, and the identity, has the man ever escaped? He is said to have escaped from the control and possession of Mr. Millspaugh. How do we know that? The only evidence is that of Mr. Brent, and what does Mr. Brent know about it? He only knows that he was in Richmond on the 20th, and was missing on the 24th. He does not even say that he has ever spoken to Mr. Millspaugh about it, or that Mr. Millspaugh was at home, or has complained about it. Mr. Millspaugh may have given him leave, or may not care whether he is away or not. There is no evidence of an escape. There is only evidence that he is missing. He was there. Now (for the argument grant it) he is here. What of it? Did he come away of his own will, and against the will of Mr. Millspaugh? Unless both these concur, there is no escape. There is no evidence on either point, except the evidence of the prisoner, which they have put in. Mr. Brent says that on the night of the arrest, Col. Suttle asked the prisoner how he came here. He replied that he was at work on board a vessel, became tired and fell asleep, and was brought off in the vessel. As they have put in this evidence, they are bound by it. This shows there was no escape, for it is the only evidence at all bearing upon the character of his act. Taking this to be true, as the claimants must, there is no escape. In *Aves' case*, 18 Pick., 193, and *Sim's case*, 7 Cushing, 285, it has been decided that the escape is the *casus foederis* under the Constitution. No matter how the slave got here, if he did not voluntarily escape, against his master's will, unless both these elements concur, he cannot be taken back. Therefore the slave was held free, in a case where he and his master were both sent here by a superior power, in a public vessel.

If there was any doubt about this matter of escape, the point should be determined against the claimant, because he has failed to produce proof within his power which would set-

tle the matter. He has not produced the only man beside the fugitive who knows whether he did escape or not. If he could not produce him in person, if there be a Judge or a Justice of the Peace in the Old Dominion, he could have brought his affidavit. He has had time to procure it since this trial began. He does not ask for a delay that he may procure it.

The only evidence, in this conflict, which can aid your Honor's judgment, is the evidence of the admission of the prisoner, made to Col. Suttle, on the night of the arrest. He was arrested suddenly, on a false pretense, coming home at nightfall from his day's work, and hurried into custody, among strange men, in a strange place, and suddenly, whether claimed rightfully or claimed wrongfully, he saw he was claimed as a slave, and his condition burst upon him in a flood of terror. This was at night. You saw him, Sir, the next day, and you remember the state he was then in. You remember his stupefied and terrified condition. You remember his hesitation, his timid glance about the room, even when looking in the mild face of justice. How little your kind words reassured him. Sir, the day after the arrest you felt obliged to put off his trial two days, because he was not in a condition to know or decide what he would do.

Now, you are called upon to decide his fate upon evidence of a few words, merely mumblings of assent or dissent, perhaps mere movings of the head, one way or the other, construed by Mr. Brent into assent or dissent, to questions put to him by Col. Suttle, put to him at the moment the terrors of his situation first broke upon him. That you have them correctly you rely on the recollections of one man, and that man testifying under incalculable bias. If he has misapprehended or misrepresented the prisoner in one respect he may in another. In one respect we know he has. He testifies that when Col. Suttle asked him if he wished to go back, he understood him to say he did. This we know is not true. The prisoner has denied it in every form. If he was willing to go back, why did they not send to Coffin Pitts' shop, and tell the pris-

oner that Col. Suttle was at the Revere House, and would give him an opportunity to return. No, Sir, they lurked about the thievish corners of the streets, and measured his height and his scars to see if he answered to the record, and seized him by fraud and violence, six men of them, and hurried him into bonds and imprisonment. Some one hundred hired men, armed, keep him in this room, where once Story sat in judgment—now a slave pen. One hundred and fifty bayonets of the regulars, and fifteen hundred of the militia keep him without. If all that we see about us is necessary to keep a man who is willing to go back, pray sir, what shall we see when they shall get hold of a man who is not willing to go back?

I regret, extremely, that you did not, sir, adopt the rule that in the trial of an issue of freedom, the admission of the alleged slave, made to the man who claims him, while in custody, during the trial, should not be received. That ruling would have been sustained by reason, and humanity, and precedent. Failing that, I hoped the facts of this case would show enough of intimidation to throw out the evidence. At least, they show enough to deprive it of all weight. I have reminded you of his condition the next morning. What must it have been there? One of his keepers, True, says he was that night a good deal intimidated. Who intimidated him? Do you recollect the significant words of Col. Suttle, "I make no compromises with you! I make you no promises and no threats." This means, it is according to the course you take now that you will be treated when I get you back. If you put me to no trouble and expense it will be few stripes or no stripes. If you do, it will be many stripes. Was ever man more distinctly told it would be better for him if he acquiesced in everything, yielded everything, assented to everything? That is what those words, uttered in a tone, no doubt, that he well understood, conveyed to his mind. But I am wasting words. I know that your Honor will give little or no weight to testimony so liable, at all times, to misconception, misrecollection, perversion, and, in this case, so cruel to use against such a person under such circumstances.

You recognized, Sir, in the beginning the presumption of freedom. Hold to it now, Sir, as to the sheet-anchor of your peace of mind as well as of his safety. If you commit a mistake in favor of the man, a pecuniary value, not great, is put at hazard. If against him, a free man is made a slave forever. If you have, on the evidence or on the law, the doubt of a reasoning and reasonable mind, an intelligent misgiving, then, Sir, I implore you, in view of the cruel character of this law, in view of the dreadful consequences of a mistake, send him not away, with that tormenting doubt on your mind. It may turn to a torturing certainty. The eyes of many millions are upon you, Sir. You are to do an act which will hold its place in the history of America, in the history of the progress of the human race. May your judgment be for liberty and not for slavery; for happiness, and not for wretchedness; for hope and not for despair; and may be the blessing of Him that is ready to perish may come upon you.

MR. THOMAS, FOR THE CLAIMANT.

*Mr. Thomas.* Having been occupied almost constantly in court since nine o'clock this morning, I would have preferred a night's repose before proceeding; but, as the defendant's counsel objected, I am as ready and would now go on.

The counsel for the defendant commenced his closing argument with some congratulations to the Court, the Marshal, the City—to almost everybody but myself and my learned associate. I, too, have some congratulations to offer; to the Marshal, who has shown, in the discharge of his difficult and arduous duty, firmness, decision, prudence, and kindness to the defendant; to the presiding judge, who, hearing patiently all that has been submitted, has shown equal fairness and liberality to either side; to my learned associate, who, though differing from me in politics, has concurred with me at every step as to the duty of counsel. These, and more, I congratulate that they are about to be relieved from a service on which they had entered, not as volunteers, but from a sense of duty, and from which they could all retire with a con-

sciousness that the blood of the murdered man did not at least rest on them. I would congratulate, also, the City of Boston, that order was supreme; that Faneuil Hall, that cradle of law as well as of liberty, was closed today against treasonable and insane speech; and that the Music Hall, too, was closed against blasphemy of Almighty God, and to charges of murder done by this court—made by one a day or two since, who, though not a lawyer, but claiming to be a minister of the gospel, has the assurance to come here within the bar and occupy a privileged seat.

The claimant in this case, Charles F. Suttle, says he is of Alexandria, in the State of Virginia; that, under the laws of that State, he held to service and labor one Anthony Burns, a colored man; that on or about the 24th day of March last, while so held to service by him, the said Anthony escaped from the said State of Virginia, and that he is now here in court. He prays you to hear and consider his proofs in support of this his claim, and, if they satisfactorily support it, that you will certify to him, under your hand and seal, that he has a right to transport him back to Virginia. This is his whole case; this is all that he asks you to do. Under your certificate he may take him back to the place from whence he fled; and he can, in virtue of that, take him nowhere else. Now, to entitle the claimant to this certificate, what must he prove? Two things. 1. That Burns owed service and labor to him, the claimant. 2. That he escaped. How is he to prove these? The statute answers. He may apply to any court of record in Virginia, or judge thereof, in vacation, and make satisfactory proof to such court or judge that Burns owes service or labor to him, and that he escaped. The court shall then cause a record to be made of the matters so proved, and also a general description of the person, with such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the seal of the court, being produced here where the person is found, and, being exhibited to you, is to be taken by you as conclusive of the facts of escape and of service due. And upon the production by the

claimant of other and further evidence, if necessary in respect of the identity of the person escaping, he is to be delivered up to the claimant, with a certificate of his rights to take him back; or his claim may be heard upon other satisfactory proofs competent in law. Such are the requirements. How have we met them? We have put in the transcript of a record. It is duly authenticated, and is conclusive upon the court of the two facts therein recited; viz., that the claimant held one Anthony Burns to service or labor, and that he escaped. These two facts are not open here. Then the question remains, is the person at the bar, Anthony Burns, as he is called—nobody thinks of calling him anything else—is he the Anthony Burns named in the record? If he is, there is an end of the case. The claim is made out, and the certificate must follow. This, with simple proof of identity, would have been all that, in an ordinary case, counsel would have deemed it necessary to do. But, in an extraordinary case like this, it was deemed by us fit to go further. And, in addition to the record and proof of identity, we have put in the testimony of Brent, who had known Burns from a boy, had had him in his own employ, and had leased him to others, for several years, during all which time Col. Suttle claimed to own him, and treated him in all respects as his slave. We put in also Burns' admissions that Col. Suttle was his master. How does it stand as to the question of identity? There is, first, the description in the record—a man of dark complexion, six feet high, with a scar on his face and another scar on his right hand, and about twenty-three or four years of age. The person at the bar is about six feet high, has a prominent scar on his cheek and a scar on his right hand, and appears about the age mentioned. It would be difficult to find another person among the whole colored population of Boston who so well answers the description as the person at the bar. The concurrence of all these marks in another would be extraordinary indeed. This is worth considering. The learned counsel complains of the expression "dark complexion" as not sufficiently certain, and objects to the record on that ground. There can

be no doubt that he is of dark complexion—the suggestion is that he is very dark. It is certainly no misdescription, and is sufficiently exact. Then they say there is a fracture of one of the bones of the hand instead of a scar. But it is, nevertheless, a scar. But they say it cannot be the Anthony Burns described in the record, because this man was here on the first of March; whereas Brent says Colonel Suttle's Anthony Burns was in Richmond on the 19th or 20th of March. It is, of course, clear that this man could not have been both here and in Virginia from the 1st to the 19th of March. To show that he was here, they have put into the case the testimony of one Jones, a colored man, and rely on that.

He undertakes to fix the time by a memorandum book, which he did not himself keep, which we have not examined, and which is not in the case. We believe that his story is manufactured for the case. He says he called on Col. Suttle, and learned from him that his man escaped on the 24th. Then he saw Burns at the window on Sunday, found he was the man who worked with him at South Boston on the 4th of March, and made up his mind that it was his duty to come here and swear so. And he has come. He tells us on whom he called with Burns, on the day when he first saw him. They asked us why we didn't call these men to contradict him. The answer is they have called most of them to support him; Maddocks was one of them, and his testimony is of the same class as Jones, coined at the same mint, made up at the same factory. The only one not of his class, was Gould. We called him, and he directly contradicts Jones. Jones undoubtedly did work at the Mattapan Works, and there was, no doubt, another colored man there with him. But it was not Burns. No doubt Whittemore saw Jones there, and perhaps on the day he named, and no doubt saw the other colored man also. But he never saw Burns there. He is mistaken in the man. That is all.

Drew, the clerk, whom they call to support Jones, and who they say does support him, so far from that, weakens his statement. He thinks it the same man. But he did not see



the scar on his face; and since he thinks him the same man and didn't see it, he thinks his face was turned the other way. Who believes he kept it so turned? A juster inference would be, that since he did not see the scar it was not the same man. Yet Drew would have been more likely to notice the man that was there than any of the rest of them. Neither Drew nor Whittemore nor Favor nor any one of all those called to support Jones, has seen Burns since, nor had they ever seen him before.

The truth is, Jones went to them and asked them if they did not remember the man he had with them cleaning the windows; told them this was the man, impressed them with this fact. They came into court with this impression and made up their minds that he was. This is the only theory consistent with their honesty. Neither of them ever expected when they first saw him, to see him again; neither had any reason for taking notice of him. Whittemore on his examination in chief, did not swear that he saw the scar; on his cross examination he did. The reason is, that since he believed he saw the man, and saw now, that if he did see him he must have seen the scar, he thinks he saw the scar. The same may be said of all, with the exception of Maddocks. His is new coin. He says he recollects it, because he recollects what he said at the time. But it is incredible that he should have said what he now swears he did, and unlikely that he would have remembered it if he had.

Besides, Jones first saw this man on Washington street on the first day of March. He was a stranger. He stepped up to Jones and asked him if he could give him work. If he had been here before that, why ask a stranger such a question? He can't tell how he was dressed. They went to see Maddocks. That night Burns went home with Jones. Why, but because he was a stranger just arrived from Virginia? He stayed with him the next day, and from that till the 18th. No doubt he did board with Jones as Jones states, but he has designedly fixed the date earlier than it was.

The learned counsel said we might press the fact that they

gave no account of Burns before the 1st of March. He was right. Where did he come from? Where was he in February or January, or last year? Where was he born? Where has he been living? They say he may have come from New York or Cincinnati or Canada. True! But where did he come from? If he came from either of these, why name three; why not stick to one? He may have come from all, perhaps; but he did come from Richmond. So he says; so we say. But they say he may have sisters, fugitives, and brothers too, and he had rather suffer than betray them. True. But if he had sisters in Canada, what harm could come to them by coming here and testifying that this man was born there? There has been time enough given to telegraph to either or all of these places; and the counsel have been grossly negligent in not doing it, if by so doing they might have delivered this man out of the peril in which they say he stands. The truth is, the sisters are all in Virginia.

They say these witnesses show that Brent is wrong in testifying that he saw Burns in Virginia on the 19th. Suppose this to be so; what then? The date is not material. A crime of a high nature, even may be charged to have been done on the 24th of March, and proved to have been done on the 24th of February. But this is not a criminal charge, but a civil proceeding. There need be no formal complaint in the case. The complaint is merely the foundation for the warrant. The person escaping may be arrested without a warrant. Brent may possibly be mistaken in the date, but as to the identity of the person, he cannot be. Dates are easily mistaken unless marked by some particular fact. Brent says he last saw him on Sunday, the 19th. It may have been a Sunday or two previously, though I think he is right. They ask us why we did not recall him. We answer, we had no need to. He is as confident now as ever, and does not wish to change his testimony. But suppose Brent to be mistaken in the date; the fact of owing service and of escape remain, and if the identity is proved, the claim is nevertheless made out. As to the identity, the testimony of Brent, who had so long and well known

him, is worth far more than all the rest, who but casually, if really at all, saw him. Here then is the man Anthony Burns, answering to the description in the record; a man whose counsel can't account for before March—here is the testimony of Brent, and then comes, besides, the defendant's admissions—made not when in a state of intimidation, but when calm, and which correspond to the statements of Brent. Brent may possibly be mistaken—so may all the rest—but this unfortunate man cannot be. He knows. Brent, they say, is credible. He swears to the conversation upstairs, which shows that Burns knew him before then. How?

The counsel read a portion of the first section of the 4th Article of the Constitution of the United States, but he did not read the whole of it. That article provided that Congress may prescribe the manner in which the judicial records of one State may be proved in another, and what effect they shall have. If Congress may do this, much more may it prescribe what shall be evidence in its own courts and what effect such records shall have there—which is all that it has undertaken to do in this case. This case then is proved in three ways—by the record, by the testimony of Brent, and by the admissions of the defendant—either of which ways would alone be sufficient. We have been asked why we didn't take the affidavit of Millspaugh.

The affidavit of Millspaugh as to the identity? How was Millspaugh in Virginia to swear that this man here in court was the man mentioned in the record? And if for any other purpose, the answer is, we had better evidence, namely, the record—a judgment. They say this man owes service, not to Sutton, but to Millspaugh. But if he is the man described, that is not open to inquiry; and, besides, Brent testifies the mortgage has been canceled. What, then, remains to be done but that you should grant Col. Suttle a certificate? It is said that, under your certificate, the man will not be carried to Virginia; that he may be carried to Cuba or Brazil. They did not tell us how. If he is carried to Cuba, it will not be by authority of your certificate. And it would be difficult

to show how a slave could be shipped from Boston to Brazil without his consent. The laws of the United States provide that a fugitive slave even cannot be shipped from one slave State to another by any vessel of more than forty tons burden without an entry being made at the custom-house. It is said your certificate sends him into eternal bondage. It is only necessary to say in reply it sends him to Virginia where he came from. When he gets back there, he will have the same rights he had before he came here. If the laws of that State don't sufficiently guard his rights, the fault is not yours nor mine. Those laws do, however, provide that slaves may institute trials for freedom, and the State pays the expenses of such trials. Your certificate has no effect upon his rights there. The late Mr. Justice Story, in the third volume of his *Commentaries on the Constitution*, says the Constitution contemplates summary ministerial proceedings, and not the ordinary course of judicial investigation to ascertain whether the claim be established beyond all legal controversy. Congress, he adds, appears to have acted upon this opinion; and, accordingly, in the statute on this subject, have authorized summary proceedings before a magistrate upon which he may grant a warrant for a removal. As to the constitutionality of this statute, it differs from that of 1793 only in respect of the record, which has already been considered. The law of 1793 has been pronounced constitutional by the highest judicial tribunal of the country; and this law of 1850 has been held to be so by the Supreme Court of this State, all the Judges concurring, and by every Judge before whom a case under it has arisen. There I leave it. And if constitutional, and the claimant has a valid claim, why shouldn't he have the benefit of it? What sort of a law is that which professes to protect one in his right of property, but which, when practically applied to a state of facts contemplated by it, from being objectionable to a class of persons, fails to secure such right?

It remains, then, only that I leave this arduous and, in some respects, unpleasant case, in your hands. I am not con-

scious of having said or done anything in the course of the examination that need have provoked personal hostility. If I have, it was not so intended. My connection with the case has been strictly professional. The extraordinary bitterness of opposing counsel has not changed my purpose or my direct course. The record is conclusive of two facts, that the person owed service and escaped. That record, with the testimony of Brent and the admissions, prove the identity. I take leave of the case, confident in the proofs presented, confident in the majesty of the law, and confident that the determination here will be just.

#### THE DECISION OF THE COURT.

*June 1.*

*Loring, J.* The issue between the parties arises under the United States Statute of 1850, and for the respondent it is urged that the statute is unconstitutional. Whenever this objection is made it becomes necessary to recur to the purpose of the statute. It purports to carry into execution the provision of the Constitution which provides for the extradition of persons held to service or labor in one State and escaping to another. It is applicable, and it is applied alike to bond and free—to the apprentice and the slave, and, in reference to both, its purpose, provisions and processes are the same.

The arrest of the fugitive is a ministerial and not a judicial act, and the nature of the act is not altered by the means employed for its accomplishment. When an officer arrests a fugitive from justice or a party accused, the officer must determine the identity, and use his discretion and information for the purpose. When an arrest is made under this statute, the means of determining the identity are prescribed by the statute; but when the means are used and the act done, it is still a ministerial act. The statute only substitutes the means it provides for the discretion of an arresting officer, and thus gives to the fugitive from service a much better protection than a fugitive from justice can claim under any law.

If extradition is the only purpose of the statute and the

determination of the identity is the only purpose of these proceedings under it, it seems to me that the objection of unconstitutionality to the statute, because it does not furnish a jury trial to the fugitive, is answered; there is no provision in the Constitution requiring the identity of the person to be arrested should be determined by a jury. It has never been claimed for apprentices nor fugitives from justice, and if it does not belong to them it does not belong to the respondent.

And if extradition is a ministerial act, to substitute in its performance, for the discretion of an arresting officer, the discretion of a Commissioner instructed by testimony under oath, seems scarcely to reach to a grant of judicial power, within the meaning of the United States Constitution. And it is certain that if the power given to and used by the Commissioner of United States Courts under the statute is unconstitutional—then so was the power given to and used by magistrates of counties, cities and towns, and used by the act of 1793. These all were Commissioners of the United States—the powers they used under the statute were not derived from the laws of their respective States, but from the statute of the United States. They were commissioned by that and that alone. They were commissioned by the class instead of individually and by name, and in this respect the only difference that I can see between the acts of 1793 and 1850 is, that the latter reduced the number of appointees, and confined the appointment to those who by their professional standing should be competent to the performance of their duties, and who bring to them the certificates of the highest judicial tribunals of the land.

It is said the statute is unconstitutional because it gives to the record of the Court of Virginia an effect beyond its constitutional effect. The first section of the fourth article of the Constitution is directory only on the State power and as to the State Courts, and does not seek to limit the control of Congress over the tribunals of the United States or the proceedings therein. Then in that article the term “records and judicial proceedings” refers to such *inter partes* and of necessity can have no application to proceedings avowedly *ex parte*.

Then if the first section includes this record, it expressly declares as to "records and judicial proceedings," that Congress shall prescribe "the effect thereof," and this express power would seem to be precisely the power that Congress has used in the Statute of 1850.

Other constitutional objections have been urged here, which have been adjudged and readjudged by the Courts of the United States, and of many of the States, and the decisions of these tribunals absolve me from considering the same questions further than to apply to them the determination of the Supreme Court of this State in Sim's case, 7 Cushing, 309, that they "are settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive on the Court."

But a special objection has been raised to the record that it describes the escape as from the State of Virginia and omits to describe it as into another State in the words and substance of the Constitution. But in this the record follows the 10th section of the Statute of 1850, and the context of the section confines its action to cases of escape from one State, etc., into another, and is therefore in practical action and extent strictly conformable to the Constitution.

This statute has been decided to be constitutional by the unanimous opinion of the Judges of the Supreme Court of Massachusetts on the fullest argument and the maturest deliberation, and to be the law of Massachusetts as well as, and because it is, a constitutional law of the United States; and the wise words of our revered Chief Justice in that case, 7 Cushing, 318, may well be repeated now, and remembered always. The Chief Justice says:

"Slavery was not created, established, or perpetrated by the Constitution; it existed before; it would have existed if the Constitution had not been made. The framers of the Constitution could not abrogate Slavery, or the rights claimed under it. They took it as they found it, and regulated it to a limited extent. The Constitution, therefore, is not responsible for the origin or continuance of Slavery -- the provision it contains was the best adjustment which could be made of conflicting rights and claims, and was absolutely necessary to effect what may now be considered as the general pacification, by



which harmony and peace should take the place of violence and war. These were the circumstances and this the spirit in which the Constitution was made—the regulation of slavery so far as to prohibit States by law from harboring fugitive slaves was an essential element in its formation, and the Union intended to be established by it was essentially necessary to the peace, happiness, and highest prosperity of all the States. In this spirit and with these views steadily in prospect, it seems to be the duty of all judges and magistrates to expound and apply these provisions in the Constitution and laws of the United States; and in this spirit it behooves all persons, bound to obey the laws of the United States, to consider and regard them.”

It is said that the statute, if constitutional, is wicked and cruel. The like charges were brought against the act of 1793; and Chief Justice Parker, of Massachusetts, made the answer which Chief Justice Shaw cites and approves, viz.: “Whether the statute is a harsh one or not, it is not for us to determine.”

It is said that the statute is so cruel and wicked that it should not be executed by good men. Then into what hands shall its administration fall, and in its administration what is to be the protection of the unfortunate men who are brought within its operation? Will those who call the statute merciless commit it to a merciless Judge?

If the statute involves that right, which for us makes life sweet, and the want of which makes life a misfortune, shall its administration be confined to those who are reckless of that right in others, or ignorant or careless of the means given for its legal defense, or dishonest in their use? If any men wish this, they are more cruel and wicked than the statute, for they would strip from the fugitive the best security and every alleviation the statute leaves him.

I think the statute is constitutional, as it remains for me now to apply it to the facts of the case.

The facts to be proved by the claimant are three: 1. That Anthony Burns owed him service in Virginia. 2. That Anthony Burns escaped from that service. These facts he has proved by the record which the statute, Section 10, declares “shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned.”

Thus these two facts are removed entirely and absolutely from my jurisdiction, and I am entirely and absolutely precluded from applying evidence to them. If, therefore, there is in the case evidence capable of such application, I cannot make it.

The third fact is the identity of the party before me with the Anthony Burns mentioned in the record.

This identity is the only question I have a right to consider. To this, and to this alone, I am to apply the evidence; and the question whether the respondent was in Virginia or Massachusetts at a certain time is material only as it is evidence on the point of identity. So the parties have used it, and the testimony of the complainant being that the Anthony Burns of the record was in Virginia on the 19th of March last, the evidence of the respondent has been offered to show that he was in Massachusetts on or about the first of March last, and thereafter till now.

The testimony of the claimant is from a single witness, and he standing in circumstances which would necessarily bias the fairest mind—but other imputation than this has not been offered against him, and, from anything that has appeared before me, cannot be. His means of knowledge are personal, direct, and qualify him to testify confidently, and he has done so.

The testimony on the part of the respondent is from many witnesses whose integrity is admitted, and to whom no imputation of bias can be attached by the evidence in the case, and whose means of knowledge are personal and direct, but in my opinion less full and complete than that of Mr. Brent.

Then between the testimony of the claimant and respondent there is a conflict, complete and irreconcilable. The question of identity on such a conflict of testimony is not unprecedented nor uncommon in judicial proceedings, and the trial of Dr. Webster furnished a memorable instance of it.

The question now is, whether there is other evidence in this case which will determine this conflict. In every case of disputed identity there is one person always whose knowledge is perfect and positive, and whose evidence is not within the

reach of error, and that is the person whose identity is questioned, and such evidence this case affords. The evidence is of the conversation which took place between Burns and the claimant on the night of the arrest.

When the complainant entered the room where Burns was, Burns saluted him, and by his Christian name—"How do you do, Master Charles?" He saluted Mr. Brent also, and by his Christian name—"How do you do, Master William?" (To the appellation "Master," I give no weight.) Col. Suttle said, "How came you here?" Burns said an accident had happened to him—that he was working down at Roberts', on board a vessel—got tired and went to sleep, and was carried off in the vessel. Mr. S.: Anthony, did I ever whip you? B.: No, sir. Mr. S.: Did I ever hire you out anywhere you did not wish to go? B.: No, sir. Mr. S.: Have you ever asked me for money that I did not give it to you? B.: No, sir. Mr. S.: When you were sick, did I not prepare you a bed in my own house, and put you upon it, and nurse you? B.: Yes, sir. Something was said about going back. He was asked if he was willing to go back, and he said—Yes, he was.

This was the testimony of Mr. Brent. That a conversation took place was confirmed by the testimony of Caleb Page, who was present, and added the remark that Burns said he did not come in Capt. Snow's vessel. The cross-examination of Brent showed that Col. Suttle said—"I make you no promises, and I make you no threats."

To me this evidence, when applied to the question of identity, confirms and establishes the testimony of Mr. Brent in its conflict with that offered on the part of the respondent, and then on the whole testimony my mind is satisfied beyond a reasonable doubt of the identity of the respondent with the Anthony Burns named in the record.

It was objected that this conversation was in the nature of admissions, and that, too, of a man stupefied by circumstances and fear, and these considerations would have weight had the admissions been used to establish the truth of the matters to which they referred, *i. e.*, the usage—the giving of money—

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nursing, etc.; but they were used for no such purpose, but only as evidence in reference to identity. Had they been procured by hope or fear, they would have been inadmissible; but of that I considered there was no evidence.

On the law and facts of the case, I consider the claimant entitled to the certificate from me which he claims.

THE TRIAL OF CHARLOTTE GREENWALT  
AND SARAH MOODY, AS COMMON SCOLDS,  
NEW YORK CITY, 1819.

THE NARRATIVE.

It was nearly a century ago, in New York City, that two women, who had been indicted by the Grand Jury for being common scolds, were put on their trial before the Recorder and a jury. Though it was insisted that this was an obsolete crime in this country, the Judge did not think so, and committed the case to the jury, which acquitted both women.

THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, December, 1819.*

HON. P. A. JAY,<sup>2</sup> *Recorder.*

*December 7.*

These two women had been indicted by the Grand Jury as common scolds.

*Mr. Van Wyck*<sup>3</sup> for the People.

*Dr. Graham*,<sup>4</sup> *Mr. Price*<sup>5</sup> and *E. Morrell* for the Prisoners.

*Mr. Price*, for Charlotte Greenwault, contended that it was incumbent on behalf of the prosecution, previous to the trial, to point out to the defendant the particular instances of scolding on which he intended to rely; and as, in this case, the District Attorney had not so furnished her with a bill of particu-

<sup>1</sup> \*New York City Hall Recorder. See 1 Am. St. Tr. 61.

<sup>2</sup> JAY, PETER AUGUSTUS. (1776-1843.) Born Elizabeth, N. J. Was a member of the New York State Assembly in 1816 and active in promoting legislation for the building of the Erie Canal. Recorder New York City 1819-1821 and member of the New York Constitutional Convention in 1821. He died in New York City.

<sup>3</sup> See 4 Am. St. Tr. 547.

<sup>4</sup> See 4 Am. St. Tr. 854.

<sup>5</sup> See *ante*, p. 360.

lars, he should be precluded from proceeding further in the prosecution.

*Mr. Van Wyck* insisted, that although the practice of the courts in England, in the prosecution of a common barrator, required that the particular acts relied on should be furnished to the defendant previous to his trial, yet that practice was peculiar to that offense only, and never applied to the case of a common scold. In a trial for this offense it would be impossible to point out particular instances of scolding, nor do any of the authorities cited support the position assumed by the opposite counsel; but, on the contrary, the authority last cited shows clearly that the practice never existed.

*Mr. Price* insisted, that though no express authority authorized this practice in the case of common scolds, yet the offense of barratry, in all the books, was placed on the same footing, and was governed by the same principles.

The other *Counsel* for *Prisoners* strongly asserted that it had been decided in this court that an indictment could not be sustained in this country against a common scold; and one of them said that such a decision had been pronounced by De Witt Clinton while sitting in this court as Mayor; but the counsel did not produce any such decision.

The RECORDER said that it was not necessary for the District Attorney, previous to the trial of a woman as a common scold, to furnish her with a specification of the particular instances of scolding upon which he intended to rely. In the case of barratry this practice had prevailed in the English courts; but none of the authorities show that, in this respect, the offense under consideration is placed on the same footing. There is no reason why it ought; and in the view of the Court it would be impossible for the District Attorney, in a case of this description, to furnish such specification.

#### THE EVIDENCE.

*Charlotte Greenwalt* resided at number 47 Gold street, near the families of James Kelso and one Catharine Devoe. For several years the defendant had

been in the habit of abusing the female members of those families by calling them the most indecent and opprobrious names, applicable to a woman, whenever

she could see any of them either at their own door or in the street. She chased the children of Kelso in the street, abused the aged father of Mrs. Devoe on all occasions, and frequently spit in the face of her young daughter. *Kelso* stated in his testimony that he was so much annoyed by the defendant that unless relieved he should be under the necessity of removing from her neighborhood. The abuse of defendant was not confined to the families of Kelso and Devoe, but she was in the habit of abusing Mrs. Margaret Tierce, who never spoke to her. The defendant watched at her own door, and, whenever she saw Mrs. Tierce, abused her by bestowing on her the vilest epithets, and said that she kept a bad house.

*Jameson Cox* and *Clarkson Crolius*, for the prisoner, said that she is very deaf, and as is common with people in that situation, is very jealous, and supposes when people are discoursing that she is the subject of discourse. Both these gentlemen had known her a number of years and she is an industrious, respectable woman, never, to their knowledge, in the habit of using obscene language. She was the prosecutrix in two several prosecutions, now pending in this court, against the Devoes, for abusing her,

*Hannah Brady*. Have heard Mrs. Devoe and her daughter use towards and concerning the defendant such language as a virtuous female would blush to repeat.

After the arguments of the respective counsel, the RECORDER charged the jury that to support a prosecution for this offense it must be established that the defendant was a common scold. The offense, in principle, was the same as for a common nuisance. It must appear to be to the common disturbance of the neighborhood. In this case the witnesses who prosecute appear to have had violent quarrels with the defendant. Recriminatory language was used as well by the Devoes as the defendant. The testimony appears to the Court rather slight to produce a conviction for the offense: it is a matter of fact solely for the determination of the jury.

The *Prisoner* was acquitted.

*Sarah Moody* was tried immediately after.

*Margaret Kay* testified that the defendant was in the habit of bestowing the most scandalous epithets on the witness and her daughters; and scolded to others in their houses and in the streets.

*Sophie M'Cready*. The prisoner, without provocation, came into the yard of the witness and accused her in plain terms of infidelity to her deceased husband.

*Mr. Van Wyck*. I abandon this prosecution.

The *Prisoner* was acquitted.



## THE TRIAL OF RICHARD SMITH FOR THE MURDER OF JOHN CARSON, PHILADELPHIA, 1816.

### THE NARRATIVE.

In Philadelphia, in the year 1801, Ann Baker was married to John Carson. About 1810 he left home, and his wife not hearing from him for over two years, married Richard Smith, but in a little time John returned and was quite angry when he found Richard in his home, in possession of his goods and chattels, and surrounded by his children. John proceeded to chase Richard from the place, but at the instigation of the woman, Richard came back next day and tried to take possession, and John, refusing to leave, was shot and killed by Richard. The latter was tried for murder in the first degree, and the Judge told the jury that Richard was clearly guilty. He was promptly convicted and as promptly hanged.

### THE TRIAL.<sup>1</sup>

*In the Court of Oyer and Terminer, Philadelphia, Pennsylvania, May, 1816.*

HON. JACOB RUSH,<sup>2</sup> *Judge.*

*May 10.*

The *Prisoner* having been previously indicted for the murder of John Carson, by shooting him through the head, and having pleaded *not guilty*, his trial came on today.

<sup>1</sup> Wheeler's Criminal Cases, see 1 Am. St. Tr. 108.

<sup>2</sup> RUSH, JACOB. (1746-1820.) Born near Philadelphia. Graduated Princeton 1765 (A.B.), 1768 (A.M.), 1781 (LL.D.). Practiced law in Philadelphia. Justice Supreme State Court. Judge Court of Errors and Appeals 1784-1806. President City Court of Common Pleas 1806-1820. Defended Benedict Arnold in controversy with Governor Joseph Reed 1779. His publications include: *Resolve in Committee Chamber*, Dec. 6, 1774; *Charges on Moral and Religious Subjects*; *Character of Christ and Christian Baptism*. He died in Philadelphia.

*Jared Ingersoll*<sup>3</sup> and *Edward Ingersoll*<sup>3a</sup> for the Commonwealth; *William Rawle*,<sup>4</sup> *Peter A. Browne*<sup>5</sup> and *J. B. Smith*<sup>6</sup> for the Prisoner.

#### THE EVIDENCE.

From the testimony of the several witnesses in the case the following material facts were brought out: On January 20th, about eleven at night, the prisoner shot Carson through the head, of which wound he died on February 4th. On Wednesday, January 7th, prisoner and deceased dined together at the home of John Carson, corner of Second and Dock streets. On this occasion John Carson got into a rage, at seeing the prisoner assume the direction of his children and his servants, and

seizing a knife, made an attempt to strike him, the prisoner laid hold of his arm, on which the deceased with the other arm, took up another knife. Mrs. Carson attempted to hold her husband; but breaking loose, he ran down stairs, with two knives in his hands, in pursuit of Smith, who had gone off without his hat. Upon Mrs. Carson telling her husband if he wanted to commit murder, to murder her, he exclaimed, Murder!—Yes! The evening of this very day, the prisoner was seen in the kitchen

<sup>3</sup> See 4 Am. St. Tr. 625.

<sup>3a</sup> INGERSOLL, EDWARD. (1790-1841.) Born Philadelphia. Graduated University of Pennsylvania 1808. Admitted to Pennsylvania Bar 1811, and practiced in Philadelphia. Deputy Attorney General 1814. Published "Digest of the Laws of the United States from 1798 to 1820." "Abridgement of the Acts of Congress." Wrote many articles for periodicals, also poems under pseudonym "Horace." Died in Florence, Italy.

<sup>4</sup> See 4 Am. St. Tr. 624.

<sup>5</sup> BROWNE, PETER ARRELL. (1782-1860.) Born Philadelphia. Admitted to Bar 1803. Prominent member Philadelphia Bar. In 1833, during the anti-negro riots, was in charge of volunteer company and rendered efficient service. In the trials of James Weed for the murder of his daughter 1839, and of Singleton Mercer for the murder of Herberton Hutcheson 1843, Mr. Browne used for the first time in the Pennsylvania courts the doctrine of "emotional insanity." In 1811 he published two volumes of Common Pleas cases known as Brown's Reports. Active member of Hibernian Society and served as one of its two counselors 1817-1827. In later life gave up law and became interested in science, especially Geology and Ethnology. Published (1853) "Trichologia Mammalium," a work on the texture of hair and wool. For many years a member of the Franklin Institute. See Scharf Hist. of Phila. II, 1538; Campbell Hist. Friendly Sons of St. Patrick.

<sup>6</sup> SMITH, JONATHAN BRYAN. Admitted Philadelphia Bar 1812. Captain 32nd U. S. Infantry in War of 1812. Died October 23, 1872. See Martin Bench and Bar; Philadelphia Inquirer, Oct. 24, 1872.

with a pair of pistols, one of which was loaded: that he then declared that if Carson entered the door to lay hands on him he would certainly shoot him. In consequence of this violence of John Carson, he was, on the application of the prisoner, bound over the next day to keep the peace.

On Saturday evening Carson came to his house between 7 and 8 o'clock, when Mrs. Carson and Smith both left it. Carson then sent for Thomas Baker and Jane Baker, the parents of Mrs. Carson, who, about 10 o'clock, went to the house. On coming there they found Carson in the china store; he and they went up stairs into the parlor. Between 10 and 11 that evening Thomas Abbot went home, and being informed that Mr. and Mrs. Baker, who lived under his roof, had gone to Mrs. Carson's, he determined to follow them there. When he got near the house he saw Mrs. Carson and went with her into the office of Jonathan B. Smith, in the neighborhood of Carson's house. The prisoner came in soon after and asked Jonathan Smith to give him the pistol, which was refused. Mrs. Carson then said, let us go—you know where there is one. The prisoner swore if Carson attempted to touch him he would kill him. The prisoner, Mrs. Carson and Thomas Abbot left the office of J. B. Smith together and on coming to the house of Carson, Abbot stayed below and Mrs. Carson and the prisoner went up stairs. In about a minute Abbot followed them up stairs, passed the prisoner standing in the entry with his right hand upon his breast, under his

surtout coat, and his left hand also on his breast; he went into the parlor where he found Capt. Carson, Mrs. Carson, Thomas Baker and Jane Baker. Abbot had not been in the room more than half a minute when the prisoner came in and stood near the door in the same attitude in which he appeared in the entry; that is, he had his right hand under his surtout, buttoned at top and bottom, and his left hand on his breast over his right hand. Capt. Carson then got up and told the prisoner he had come to take peaceable possession of his house—that out of the house he must go. The prisoner then said, very well, and turning to Mrs. Carson said, Ann, shall I go? Who replied, No, stay. The prisoner then went to the northeast corner and Carson following him told him again and repeated two or three times he must leave the house—"my hands are tied—I have no weapon;" at this time he held his hands down by his side, and open; had nothing in his hands. Upon this Smith drew a pistol from under his surtout coat, and shot Carson in the mouth, and throwing the pistol on the floor, ran down stairs as fast as he could. Capt. Baker pursued him, heard him tumble among the china, overtook him on the step of the front door. Smith, the prisoner, when conveyed to jail, had his nose injured and bloody. Deceased declared in his last illness that the prisoner had come in like a midnight assassin and shot him like a coward. It was further in evidence that Smith might have left the corner in the parlor without running against any body.

**THE CHARGE OF THE COURT.**

**RUSH, JUSTICE.** Gentlemen of the Jury: I request your attention to what I am about to say to you, and I also request that you would consider this charge as proceeding from the whole court.

The prisoner at the bar, Richard Smith, is indicted for the murder of John Carson, by shooting him through the head, on the 20th January last. There is not the least doubt he died of the wound, after languishing till the 4th of February. It is your duty to decide, by your verdict, taking into consideration all the circumstances of the case, whether he be guilty of murder or not.

A jury has a right in criminal cases to give a special or a general verdict. A special verdict states all the material facts, and submits to the court the question of law arising on these facts. This is not usual, and is not expected by this court. A general verdict is where the jury, in general terms, say the prisoner is guilty or not guilty.

From the right which the jury has, to give a general verdict in all criminal cases, it follows they have incidentally a right to determine both the law and the facts, which are often almost inseparably connected with each other. What says the constitution upon this point? In indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases.

From the evidence it appears that John Carson, the deceased, was married to Ann Baker, in June, 1801, and that she was afterwards married in the month of October, 1815, to Richard Smith, the prisoner in the bar. It is made a question whose wife she was on the 20th of last January, the day on which Carson fell by the hands of Smith.

It is provided by our divorce law, where a man leaves his family for two years, and his wife marries after that time, in consequence of a report, apparently well grounded, that her husband is dead, that in such case she is not guilty of adultery; and that the husband, on his return, may in-

sist upon having his wife back again, or to be divorced from her; and that he may institute a suit for a divorce within six months after his return.

To make the marriage of a wife lawful in any degree, under this act, two things are expressly required by the very words of it. 1st. That the husband has been two years absent. 2nd. That a rumor existed of the death of the husband. The marriage must be founded in both circumstances to give it validity.

What is the evidence in this case? There is no doubt that Capt. Carson had been absent two years at the time his wife was married to the prisoner; but the other circumstances, viz. the report or rumor of the death of Capt. Carson has not been made out in proof. To justify the second marriage of Mrs. Carson, there should be evidence of a rumor of this description. What is the meaning of the expression "a rumor of the death of a man in appearance well founded." We think it means general report that a man died at a particular town or place, was shipwrecked, or lost his life in some way, which the report specifies. It appeals to the court that the expression, "in appearance well founded," has reference to the place and manner of his death. No such evidence has been given. Jane Baker only says, "there was a rumor of Carson's death; a sailor said so." This loose evidence is not the evidence the law requires to justify a wife's marrying in the absence of her husband. There must be a general report of his death, and of the place and manner of it.

There not being the evidence required by law, to authorize the marriage of Ann Carson with the prisoner in the bar, it is clearly the opinion of the court that it was, to all intents and purposes, null and void. This being the case, it follows that she was guilty of adultery with Smith; that the rights of Smith, as a third person, have no legal foundation or existence; that Carson had an undoubted right to proceed at law against his wife for a divorce, and to settle with her, and withdraw the suit, whenever he thought

proper, without the consent of the prisoner, or any other person. The law now under consideration supposes a case of this very kind by enacting, that in any suit for a divorce on the ground of adultery, if the defendant shall prove that the plaintiff admitted the defendant into conjugal embraces after he knew she had been guilty of adultery, it shall operate as a perpetual bar to his obtaining a divorce.

We go farther and state to you upon that point, that Ann Carson could not have two husbands at the same time. She could not be at the same time the wife of John Carson and the prisoner. She was unquestionably once the wife of John Carson, and nothing but death or divorce could dissolve the connection. These are the only two modes known to the law of terminating the marriage contract.

It is stated by the defendant's counsel that a subpoena for the purpose of a divorce is so decisive of the intent of the party that he cannot alter or change his intention. This is strange language and is equivalent to saying the bringing a suit for divorce and the decree in the case are equally binding on the party. Where would be the use of the decree if the subpoena was conclusive in the libellant? We are, therefore, clearly of opinion that on the 10th of January last Ann Carson was the wife of John Carson, and that he had a right to settle his differences with his wife and to receive her again into his arms.

It being universally understood and known that the property of the wife is the property of the husband and that he alone has the control over it, the consequence is that John Carson had an undoubted right to take possession of the house and goods which belonged to his wife on his return in January last to this city and to his family. It follows that Richard Smith, the prisoner, was an intruder and had acquired unlawful possession of the wife, of the house, and of the goods and chattels of John Carson.

This point being settled, we proceed to remark that the crime of murder essentially consists in taking away the life of a fellow creature, with circumstances that show a vindictive temper and malignity of heart.

It is not the design of the court to distract your minds or fatigue your attention by a tedious discussion on the law of murder. We shall endeavor to make you understand so much of this subject that you may be able to form a correct judgment on the question submitted to you. It will be proper to state a few leading principles that have received the sanction of the highest judicial authority in this state, subsequent to the passing the law of 1794.

In the case of the Commonwealth v. Mulatto Bob, tried at Easton in 1795, before Chief Justice M'Kean and Judge Smith, it was decided by the court that since passing the law of 1794 the intention still remains the criterion of the crime, that the intention of the prisoner is to be collected from his words and actions, and that on the supposition a man without uttering a word should strike another on the head with an axe, it would be deemed premeditated violence. In the case of The Commonwealth v. O'Hara, tried before Chief Justice M'Kean and Judges Shippen and Smith in Philadelphia in the year 1797, the court held, if the murder be committed with an instrument likely to kill, it is wilful, and that to make it deliberate and premeditated the party must have time to reflect and to frame the design, however short the time may be, and must intend to kill.

If the defendant has time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, wilful, and premeditated killing, constituting murder in the first degree within the act of assembly.

We shall presently examine the conduct of the prisoner and compare it with the principles laid down in these cases.

In the mean time, we observe to you, gentlemen, that the principles just stated are from the highest judicial authority in Pennsylvania, and that it is the duty of this court, and of you as jurymen, to submit to them.

For a moment, however, gentlemen, let us inquire into their correctness.

The wilful, deliberate and premeditated killing a person is by the law of 1794 described to be murder in the first degree.



What is it to kill a person wilfully? It is the same thing as killing him on purpose. He who does an act wilfully, does it on purpose, and he who does an act on purpose, does it wilfully.

The next ingredient to make the killing murder in the first degree is it must be deliberate. But does the law fix the time of such deliberation? No such thing, gentlemen. Does it say the prisoner must ponder over the crime for years, for months, for weeks, or days, or hours, or for any other given time? What sort of a law would it be if such construction were put upon it by courts and juries?

Suppose, for example, it should be contended that it must appear the party had pondered on the commission of the crime one hour, or five minutes before the fact.

I ask, then, why fix an hour or five minutes for deliberation? Why not half an hour? why not two hours? why not two minutes?

The truth is, in the nature of the thing, no time is fixed by the law, or can be fixed, for the deliberation required to constitute the crime of murder. To deliberate is to reflect with a view to make a choice, and if it appeared that the party did reflect, though but for a minute before he acted, it is unquestionably a sufficient deliberation within the meaning of the act of assembly.

The last requisite to constitute murder in the first degree is, that the killing must be premeditated. To premeditate is to think of a matter before hand; it is to conceive of a thing before it is executed. The word premeditated would seem to imply something more than deliberate and may mean that the party had not only deliberated, but had framed in his mind the plan of destruction.

We therefore say to you, gentlemen, and we say it confidently, that it is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind a scheme of murder, and to contrive the means of accomplishing it.

Gentlemen, it is well known that certain acts will go far to justify a man that his killing another will not be murder.

There are also other acts that are not a sufficient provocation to justify killing a person. For example, the demand of a debt is not a provocation to justify killing. It is therefore murder to kill a man in the act of asking the payment of a debt.

Further, gentlemen, it is a principle of law that no breach of a man's word or promise—no trespass either to lands or goods—no affront or gesture, will excuse a person from the crime of murder, if he becomes so far transported as to kill the person who then offends him.

Apply this to the facts before you. Suppose then the house was in fact Smith's and that Carson in going there on Saturday to demand the possession of his family, was a trespasser; it is the opinion of the court that Smith's killing him under those circumstances, in the very act of making such peaceable demand, is, in every principle of law, murder in the first degree.

To recapitulate all the testimony that has been laid before you would be an endless task, and I add a useless task, because on this trial, as on all others, a great deal of evidence has been given that has no more bearing on the case than one of Aesop's Fables, or a chapter from Don Quixote. Evidence of this description it is not our practice to take down in writing.

From this evidence, the question presented to you is, of what crime is the prisoner guilty?

Murder in the first degree is the wilful, deliberate and premeditated killing another. There are various inferior kinds of homicide. But on the present indictment, our attention is confined to the consideration of the highest and most aggravated description of the crime.

Then let us ask, did the prisoner wilfully kill John Carson? It is not pretended there was any accident in the case. The killing, therefore, was wilful and on purpose.

Was it deliberate and premeditated? or was it the effects of a sudden passion produced by a reasonable provocation? There is no evidence to show a sudden passion, or that the prisoner had, that evening, received any provocation from

the deceased. All the witnesses who were present agree, that Carson did not touch him or lay the weight of his finger upon him.

The killing, therefore, was not the effect of a sudden passion, but was it deliberate, gentlemen? Look at the prisoner standing in the entry, with the pistol buried under his surtout; see him entering the parlor in the same attitude, taking his stand, drawing the pistol and coolly discharging it into the mouth of Carson, and ask yourselves whether this was not a most deliberate act.

Was the killing premeditated? On Wednesday night he had prepared himself with pistols, and declared, if ever Carson entered the door to lay hands on him he would certainly shoot him. On Saturday evening he made a similar declaration. He did not, however, wait till Carson touched him, but shot him without receiving from him the least personal injury, or even threat. In the language of Chief Justice M'Kean we add, that where a man, without uttering a word, strikes another on the head with an axe, it is an act of premeditated violence. What is the language of the court in the case of *The Commonwealth v. O'Hara*? If the prisoner had time to think and did intend to kill for a minute, it is wilful, deliberate, and premeditated killing, as well as if he had intended to kill for an hour or a day.

With respect to the conduct of Carson at his own house, on Wednesday, in drawing a knife on Smith, it was altogether unjustifiable. What would have been the consequence if he had killed him, we are not now called upon to decide. This we will say, that two wrongs cannot make a right; that Carson's violence on Wednesday can never justify Smith, in deliberately killing Carson on the Saturday following.

Who is there among us that will justify assassination? Nobody, I trust. But it will be quite as easy to justify assassination, on the principle of revenge, as the conduct of the prisoner in deliberately shooting Carson through the head three days after Carson had injured him.

Much has been said of the principle of self defense, as

applied to the prisoner; but with what propriety, we are at a loss to discover. Who laid hands on him? who attacked him? who threatened him? who touched him? He went voluntarily into the room, chose his station, and fired when he pleased. He was not dragged into the room, and there detained against his will. On the contrary, he only was armed, and under restraint from no person.

It has been said by one of the witnesses that the pistols were procured for self defense. If this be really the case, it is much to be lamented they were employed for a most mischievous and deadly purpose.

The dying declarations of John Carson are of weight in this cause, who averred, when he lost all hopes of living, that the prisoner had come like an assassin, and shot him like a coward. This description of the offense of the prisoner accords very much with the representations of it given by the witnesses.

The flight of the prisoner is always, in the eye of the law, evidence of guilt. Smith had no sooner discharged the fatal instrument, than it was dashed on the floor, and he fled from the room with the utmost speed. His fall among the china, the difficulty of getting through the street door, which opened inwardly, and his stumbling at the front door, were the providential circumstances that prevented his escape. The man who has committed no crime, in general faces his accusers, and maintains his innocence. On the other hand, the guilty creature, who knows he has exposed himself to the just vengeance of the law, is uniformly seen to endeavor to avoid by flight that punishment which he is conscious he has merited at every earthly tribunal.

A good deal has been said of the history of Captain Carson's life and character. Alas! gentlemen, it is the melancholy history of his death you are called upon to hear and to decide. He had settled his difference with his wife on Friday, and anxious for reunion had formed a plan of getting possession of his house on Saturday, the next day. He very naturally, therefore, sends for his wife's nearest connections to be witnesses of his ordering the prisoner to quit

his house. It is plain, they were not sent for to assist him to take possession by force, because they came without arms and no force was used. But whatever was his motive, it was so ordered by Providence, that it was an invitation to his death and funeral.

It is true, gentlemen, Smith did go on Saturday night to look for a magistrate to turn Carson out, as he expressed it. Being disappointed he resolved to take the law in his own hands, and deliberately procuring a pistol, went forward into the room where he knew Carson was, and coolly discharged its contents into his head.

Justice is certainly due to the prisoner at the bar—nobody doubts it. But is justice due to Richard Smith only? Is no justice due to the public—is no justice due to society? Is the life of a man of no value? Is no atonement to be made to offended law for the shedding of innocent blood? Judge for yourselves, gentlemen.

Punishment is not the province of a court and jury. Our rulers, the legislature of our country, have established a penal code, assigning to each crime its proper punishment. Upon this point we have no right to reason: acquiescence is our duty. I will, however, observe, gentlemen, that the practice of all nations, civilized and barbarous, accords with the voice of religion, which is the voice of God: whoso sheddeth man's blood, that is, deliberately sheds it, by man shall his blood be shed.

What is the case before you in substance, and in a few words? It is this—the prisoner having, by color and forms of law, acquired unlawful possession of the house of Carson, of his goods and chattels, of his wife and children, deliberately shot him afterwards in his own house, in the very act of peaceably demanding restitution of all that was dear to him.

It is a fine reflection of Chief Justice Hale—"Let me remember," says that great and good man, "when I find myself inclined to pity a criminal, that there is also pity due to the people and to the country." The court have done their duty—it remains with you to do yours. Remember,

gentlemen, the vows of God are upon you to decide according to law and to evidence.

We have stated both the law and the facts, and leave you to judge for yourselves: you have a right to determine both. If you believe the witnesses, who were present and saw the crime committed, it is your duty to convict the prisoner of murder in the first degree; but if you do not believe the witnesses, it is your duty to acquit him.

#### THE VERDICT AND SENTENCE.

The *Jury* found the prisoner *Guilty*, the COURT sentenced him to be hanged, and he was executed in pursuance thereof.

## THE TRIAL OF ABRAHAM BOGART FOR MIS- DEMEANOR IN OFFICE, NEW YORK CITY, 1856.

### THE NARRATIVE.

A bad character and a notorious pickpocket, named Nambe, with more than one *alias*, had been indicted by the Grand Jury in New York City for grand larceny, and another charge of the same kind was made against him before Magistrate Bogart, sitting in the well known Police Court at the Tombs. He was in jail on the indictment, but when brought before the Magistrate he asked to be let out on bail. The Magistrate acceded to his request after he and an individual named Porkousky had signed a bail bond in the sum of one thousand dollars. Later, when the presence of the prisoner was needed for his trial, neither he nor his surety could be found. A statute of New York enacted that no Magistrate should admit to bail a person committed by any one but himself, without giving notice to the District Attorney. The first charge had been made before the City Recorder and Magistrate Bogart gave no notice of his intended action to the District Attorney. For this he was indicted for misdemeanor in office and found guilty by the jury, whose decision was later affirmed by the Supreme Court.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, February, 1856.*

HON. ELISHA S. CAPRON,<sup>2</sup> *City Judge.*

*February 6.*

The defendant, a Police Judge of the City of New York, had been indicted by the Grand Jury for having wilfully taken bail of and discharged from custody a prisoner who

<sup>1</sup> Parker's Criminal Reports. See 4 Am. St. Tr. 88.

<sup>2</sup> CAPRON, ELISHA SMITH. (1806-1883.) Born Utica, N. Y. Prominent lawyer of Little Falls and Herkimer County, N. Y. Visited



had been committed on a charge of larceny by another Judge, without he (the defendant) having given notice to the District Attorney as required by the State statute.<sup>3</sup> The indictment charged that

"While such law was in force and in effect, one William Nambe, otherwise called William Lambe, was indicted in the Court of General Sessions of the Peace in the city and county of New York, April 4, 1855, for the crime of grand larceny, in feloniously stealing, taking and carrying away the goods, chattels and personal property of one James E. Miller, and thereafter, on such indictment, was committed to the custody of the keeper of the city prison, to await his trial on such indictment by a magistrate of the city and county of New York, viz., James M. Smith, Jr., Esq., recorder of the city of New York; that whilst the said William Nambe, otherwise called William Lambe, stood committed, as aforesaid, by the said James M. Smith, Jr., Esq., recorder as aforesaid, the said Abraham Bogart, Jr., well knowing such law aforesaid, with force and arms, at the ward, city and county aforesaid, on July 22nd, 1855 did, wilfully, unlawfully, maliciously and corruptly, admit to bail said William Nambe, otherwise called William Lambe, as appears by a recognizance, to answer then and there, by said Abraham Bogart, Jr., police justice, taken in the sum of \$1,000 each and signed by the said Lambe and one Joseph Porkousky.

"And then and there, after such recognizance being taken by him, did discharge from custody the said William Nambe, otherwise called William Lambe, he, the said Abraham Bogart, Jr., then and there well knowing that the said William Nambe, otherwise called William Lambe, then and there stood committed, as aforesaid, by the said James M. Smith, Jr., Esq., Recorder as aforesaid, and that he, the said Abraham Bogart, Jr., was not the committing magistrate,

California and published in 1854 a History of California. Appointed City Judge of New York 1856. Died in Stamford, Connecticut. (See Holden (F. A.) Geneology of the Descendants of Banfield Capron 1660-1859; Allibone Dict: Drake: Am. Biog: New York City Directories 1872-1873; Hardin (G. A.) Hist. of Herkimer Co.).

<sup>3</sup> "No officer other than the committing magistrate shall let to bail any person charged with a criminal offense, unless notice of the application to bail such person shall have been given to the district attorney of the city and county of New York at least two days before such application, specifying the name of the officer, the time and place when and where such application will be made, and the name and residence of the proposed bail, and the original commitment and proofs upon which it is founded shall have been presented to the officer to whom the application for bail is made. The person having the custody of such commitment and proofs shall, when required in writing, produce the same before the officer last mentioned.

The *Defendant* pleaded *not guilty*.

*A. Oakley Hall*,<sup>4</sup> District Attorney, for the People.

*Henry L. Clinton*,<sup>5</sup> for the Defendant.

#### THE WITNESSES FOR THE PEOPLE.

*John S. Magnus*. Was present July 28th, 1855, when Justice Bogart, acting as police justice, bailed William Nambe, about 11 in the morning; the bail was taken in the large room; the justice requested me to write out the recognizances; prisoner was not

there; the man who went bail was there; there was a number of persons present; cannot now say who they were; there were two commitments, one by Recorder Smith for grand larceny and one by the defendant.

The two commitments and the recognizances were read to the jury by *Mr. Hall*.

*Cross-examined*. Am now an attorney in this city; have been a policeman about 16 years; have known and been intimate with Justice Bogart about twenty-five years. He is attached to the Tombs Police Court; the business there is very large; the magistrates have a crowd around them nearly all the time; they have to use rapid dispatch; have often written there for the jus-

tices; there was nothing singular in Justice Bogart asking me to fill up these bonds; saw as much of the man who offered bail as Justice Bogart did; he looked like a gentleman; had never seen him before; have been very intimate with the criminal business of this city; knew the sort of men who become straw bail; there was nothing suspicious in the man's appearance; they are

and then and there well knowing that no notice of the application to bail said William Nambe, otherwise called William Lambe, had been given to the district attorney of the city and county of New York, and that the proofs upon which said commitment was founded had not been presented to him, the said Abraham Bogart, Jr., police justice, as aforesaid, upon said application to bail. And the jurors aforesaid do say, that notice of the application to bail said William Nambe, otherwise called William Lambe, had not been given to the district attorney of the city and county of New York, and that the proofs upon which the commitment was founded had not been presented to the said Abraham Bogart, Jr., police justice, as aforesaid, upon said application to bail.

"Wherefore the jurors aforesaid, upon their oaths aforesaid, do say, that the said Abraham Bogart, Jr., police justice, as aforesaid, did, wilfully, maliciously, unlawfully and corruptly, an act prohibited by law, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity."

<sup>4</sup> See 5 Am. St. Tr. 94.

<sup>5</sup> See 5 Am. St. Tr. 95.

sometimes very short of clerks at the Tombs Court; there is nothing unusual for others, like myself, to write there; it is not unusual for magistrates at the Tombs to take bail for persons committed at the Court of General Sessions; in the manner in which the bail was taken, there was nothing, in my mind, the least suspicious.

*Robert Johnson.* Have been a police clerk for six years; have generally acted at the Tombs; Justice Bogart has been four years in office; Nesbitt was the clerk there from ten a. m. to two p. m.; during that time I was at the Mayor's office; was not at the Tombs when the bail was taken; the clerks at the Tombs were Mr. Nesbitt and sometimes myself; was shown the recognizance in question by Justice Bogart; he said he had taken it in a case where the party had been committed by Recorder Smith, but he thought he had the right to take the bail; told him I thought he had no right to take it unless he had a notice from the District Attorney; do not recollect any further conversation, except that I told him the prisoner was known to be a notorious pick-pocket, and that he should be cautious; it is the general custom for police justices, in taking bail for indictments, to consult the committing officer or the district attorney.

*Cross-examined.* Officer Patterson used to take down examinations at the Tombs Court in the place of the regular clerks; others assisted the magistrate in taking examinations and making out papers; did not see the party who offered bail in this case; frequently examinations are go-

ing on in two or three rooms at once.

*James Nesbitt.* Was a police clerk at the Tombs last summer; had no conversation with Judge Bogart on the subject of bailing Nambe; was not present at the time.

*Cross-examined.* It often happens that the clerks are called away on business, and that officers are required to write bonds for them; have known counsel to fill up a bond himself; it would not be unusual for Mr. Magnus to fill up a bond.

*Francis Spicer.* The *District Attorney* offered to prove by the witness that he, the witness, had made search for the said Porkousky at 278 Houston street, in this city, and other places, and was unable to find him.

The *Counsel for the Defense* objected on the ground that it was inadmissible under the indictment; also on the ground that it was in any event incompetent as against the defendant, unless it was shown that defendant was aware, at the time he took the said bail, he the said Porkousky did not reside at the place above mentioned.

The COURT admitted the evidence.

*Mr. Spicer.* Was attached to the district attorney's office during last summer; went to No. 278 Houston street to search for Porkousky, the bail in this case; did not find Porkousky, or any person of a similar name, neither at 278 Houston street nor anywhere in the neighborhood; could not find that he had ever lived there. When I have arrested parties on bench warrants from the Court of Sessions, I have often taken them before the police magis-

trates after the Court of Sessions had adjourned.

*Counsel for Defense* said that the defense had also made strenuous exertions to find Porkousky, and had failed, and he was willing to admit that he was not

what he represented himself; he was also willing to admit that the party had been bailed without notice to the district attorney, and that the Court of Sessions had adjourned at the time bail was taken.

#### THE WITNESSES FOR THE DEFENSE.

*James Martin.* Judge Bogart called on me and told me to use all exertions to have Nambe rearrested, and if he was rearrested he would give a reward; this was about middle or latter part of August, 1855.

*Ralph Patterson.* Am attached to the Tombs Police Court; remember the bail being taken in this case; was present when one of the affidavits was taken; I saw the man who was bailed; I tried to find him at Judge Bogart's direction; the judge told me to look out for him and arrest him; this was about five days after the bail was taken. Was not told to look after Porkousky.

To *Mr. Hall.* It is very common at that court for the magistrates to be so much engaged that three or four clerks and police officers have to write for them;

it is a common thing for the sitting magistrate to have examinations going on in one room while he has to go to and fro into other rooms to answer questions.

*Stuart J. Smith.* Have been a police officer for eight years; was at the Tombs Court last summer after the bail was taken in this case; Judge Bogart gave me orders to rearrest the man Nambe; was sergeant of a police squad, and he told me to instruct my men to arrest him; think he told me to rearrest about a week after the bail was taken; was an officer of Judge Bogart's court, and considered his orders in this respect, and in any other, binding upon me; made every exertion personally, and through the policemen under my charge, to rearrest Nambe, but failed to find him.

The *Counsel for the Defense* and for the *People* respectively summed up the case to the jury.

JUDGE CAPRON. Gentlemen of the Jury: Notwithstanding a long time has been occupied in the trial of this cause, I do not myself think that it involves any principles that are abstruse. The facts are but few, and the law that applies to them is, in my judgment, very simple. Before I begin to state what appears to me to be the law of the case, it is, perhaps, proper that I should repeat what I said upon the trial of a cause at the last term of this court, which is somewhat similar in its character: that this is not the most serious offense that a man can be charged with; it does not involve

his life, but it does his reputation to a considerable extent. It may involve his liberty, and may affect his political prospects, inasmuch as it affects his general character, and it is therefore highly important that you should weigh the facts candidly and carefully. You should not come to any hasty conclusion, but fairly weigh all the testimony in the case, and give every circumstance in favor of the defendant its full weight; because a citizen who has stood well in the community, who has been clothed with public office, and intrusted with the enforcement of public justice, is presumed to have held a good position in society, and he should not be struck down from that position except upon very clear evidence. It is of no use laboring to acquire good character and an honorable standing in society if a very little evidence, something that perhaps a party cannot explain at the moment, is to strike him down and destroy his prospects forever. You should, therefore, in this case, when you retire to consult with each other in respect to it, give to the defendant the benefit of every presumption in his favor. But there is another rule which it is your duty to observe. You should not allow your sympathy for the defendant, at the same time that you are anxious to give him the benefit of every doubt, and full weight to every piece of evidence that bears in his favor, to blind you to the real state of the case, because the public, gentlemen, have an interest in this question as well as he. The public have intrusted him with the exercise of certain duties for the public benefit and safety. He is a criminal officer. He is appointed, as it were, between the public and those who violate the law, for the protection of the public. His duty is to see that those who are brought before him suspected of crimes, and especially if they are indicted, are not let loose upon the community, under circumstances which may lead to their escaping trial and escaping justice, and those who become bail for them suffer nothing, because they are worth nothing.

At the same time that you regard all the rights of the defendant, and give him the benefit of all the doubts that

exist in your minds as to the question of his guilt, you will remember that you are also the guardians of the public; and if the case is clear, if it is so clear that you have no reasonable doubt upon the question of his guilt, you should allow no sympathy that you may have for him to prevent you from finding him guilty, because the betrayal of an official trust is one of the most heinous crimes that can be committed. We frequently do not think it is. We think it is a small matter when judicial or executive officers, who are intrusted with official acts, accept a bribe, or from corrupt motives let a prisoner run at large; but it is a very serious charge. A man may occupy but an humble office, and his derelictions of duty may not be very serious; yet when the public once get accustomed to that kind of conduct upon the part of public officers, some other official, who has high public interests intrusted to his charge, may, by and by, violate his duty, and the community may feel seriously the effect of his conduct and the danger of intrusting power to men who do not deserve it. The governor of the State, or some high judicial officer of our courts, may, if the public become insensible to the importance of judicial duty and fidelity, commit some great wrong, and hence it is just as important that fidelity in public office should be exacted among the lowest grade of officers in the State as it is among the highest. Therefore, gentlemen, when you come to consider this case, do not let any sympathy for the defendant deter you from finding him guilty of the crime imputed to him, if you have no reasonable or intelligible doubt that he is guilty.

Here is another consideration: I mention it because the jury, that I had reference to when I mentioned the other case, canvassed the question (as I heard since) how much punishment should be inflicted upon the defendant if found guilty. That was an improper inquiry. It gave to the Court as well as to every one else the idea that the jury thought he was guilty, and only refused to find him so because they did not know his punishment. That, gentlemen, is not a question for you, but one entirely for the Court. If the defendant

should be found guilty, the punishment cannot extend beyond a year's imprisonment in the county jail and a fine of \$250; but it may run as low as one hour's imprisonment and a fine of one cent. The Court have the discretion of inflicting a fine from one cent up to \$250, or imprisonment from half an hour up to one year; and it is fair to be supposed that the Court, in the exercise of a proper judgment, will always apportion the punishment to the circumstances of each particular case. The jury should therefore have no regard whatever to that consideration, leaving to the Court the exercise of the discretionary power which the law has confided to it, confining themselves to the mere determination of guilt or innocence. Now, gentlemen, the defendant here is proved to be a police magistrate; a very important officer in this community, and one who has more to do with the administration of justice, so far as the public peace is concerned and the safety of citizens, than any other class of officers in the city; therefore, it is highly important that they should be intelligent and honest. The people charge him under the thirty-ninth section of the statute, which reads: "Where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or in any other section or statute, the doing such act shall be deemed a misdemeanor." In other words, the act is a misdemeanor, whether committed by an officer or anybody else who is prohibited by law from doing that act. Now, it cannot make any difference whether the individual is an officer or a private citizen; because if an officer does an act beyond his jurisdiction, and therefore contrary to law, he cannot be said to do it officially, and therefore it is out of his office. An officer has two relations: he is a private citizen and an officer. What he does in his official capacity, and within his jurisdiction, he does as an officer, but what he does not in his official capacity, or where he has no jurisdiction, he does not as an officer. Therefore, in my opinion, the act covers the case of an officer as well as of a private individual, upon the ground that what



he does, if forbidden by law, is not an official duty at all, any more than if done by a man who did not hold the office. When the performance of an act is prohibited by statute, it is a misdemeanor, and the person committing it is liable to the punishment I have stated. Now, the people say that the defendant violated this law, which says:

"No officer, other than the committing magistrate, shall let to bail any person charged with a criminal offense, unless notice of the application to bail such person shall have been given to the district attorney of the city and county of New York, at least two days before such application, specifying the name of the officer, the time and place when and where such application will be made, and the names and residence of the proposed bail, and the original commitment and proofs upon which it is founded, shall have been presented to the officer to whom application for bail is made."

Gentlemen, you can see the great propriety of this law. In this city there are many committing magistrates. A warrant is issued; the criminal is brought up before a committing magistrate, who takes his examination and commits him to prison. If application is made to that same individual to let him out on bail, he can judge whether he should be let to bail, and in what sum. He knows the history and character of the case, and therefore, in law and in fact, is better able to judge of the proper amount of bail which should be taken, and who would be good bail, than any magistrate who had not had the case before him. A great deal of evil resulted in this city from magistrates committing persons charged with a crime, and then the friends of the prisoner going to another justice, who was a perfect stranger to the case, and giving bail in perhaps a nominal sum, when the offense was one which required bail to be taken in a large amount; and it may be he omitted to go before the officer who committed him because it was such a case, and they wanted to get off more easily. That is the reason why the statute was passed, and it is an important act. "No officer shall let to bail." That is a complete prohibition on every officer except the magistrate who committed the individual to prison, unless notice is given to the District Attorney, and unless the officer to whom the application is made has the original commitment and proofs before him, to

look at, upon which the prisoner was arrested by the other magistrate and committed to jail. The reason of this provision is, that it may often happen that the same officer who committed the prisoner may be away, sick or dead; and it will therefore be necessary, from various causes, to go before some officer who did not cause the arrest to be made. But this statute provides that no other officer shall do it, unless the District Attorney has two days' notice of the fact, so that he can look into the case and understand it, and unless the original papers upon which the arrest and commitment were made are brought before the officer to whom the application is made for bail. These papers inform the officer what is the nature of the case, and he can act intelligently. This statute, therefore, prohibits any officer the right to take bail where another officer has made the commitment, without these papers are presented; and my construction of the law is this: that although an officer like Mr. Bogart may have general authority to let to bail, yet this statute gives him no jurisdiction over a case, which another officer originally had, without the production of the papers upon which the arrest was made, the complaint and the proofs. If he does not get them, he has no more jurisdiction over a party or a case than a common Justice of the Peace has, who undertakes to render judgment against a man without summons issued and returned duly served. He is prohibited from doing the thing until these papers are produced. If he does it, therefore, he does it, not as a justice, because he has no jurisdiction in the case as a police justice, without the possession of these papers in the first place; he does it as a private individual, and any other man has just the same right he has to let to bail. The bail taken probably would be good, and the person who became bail would be held. But that is a question I have not heard agitated, and do not know that it has been decided. All that, however, is no answer to the question whether he had any right to act at all, so far as he is concerned, when he is called to account for what he has done contrary to the statute. Now, the people say that this officer, on the 28th July last, let to

bail a prisoner, whose name has been mentioned to you, and who had been previously, upon the 18th day of the same month, consigned to prison under a commitment issued by Recorder Smith. If the charge presents a case precisely within the eighth section, Recorder Smith committed the man to prison. The papers were upon file. The defendant is charged with having let him to bail without giving any notice to the District Attorney upon the subject, and without having before him the necessary papers to give him jurisdiction in the case. He had the commitment, and not the proofs; but the statute is not satisfied without the whole. The commitment was not a matter of much importance, so far as taking bail was concerned; but the proofs, to give the officer a knowledge of the case, were the great things required. It is not denied, I believe, gentlemen, that Mr. Bogart did this act. They admit that he issued a warrant against the same man, who was brought up before him upon a complaint made before him. Now, he had a right to take that complaint and the examination, and, if the case was made out, he had a right to let him to bail without giving any notice to the District Attorney, because it was a case where he himself had caused the arrest. The complaint had been made before him, and therefore that was not a case coming within this section. Under the complaint filed before him, and under the warrant issued by him, he had a right to bring this man up, hear his case, commit him to prison, or let him to bail. But the charge is, that when application was made to let him to bail, it was not upon his case only, but upon Recorder Smith's, and the charge is upon that act, an exercise of power with which he was not clothed, in taking bail of this man and setting him at liberty. And further, it is urged that this bail was what is called straw bail; in other words, that the bail had no real estate, that there was in fact no such man, and that he was not to be found. That circumstance, however, is not material, any further than to show the general nature of the whole transaction; it does not form an element in the offense.

In coming to a conclusion, gentlemen, upon the guilt or innocence of Justice Bogart, a great deal has been said by the

counsel upon both sides as to what was necessary to constitute guilt. My own opinion is, and I think it is borne out by the authorities, that where an act is forbidden and a party does that act, he is guilty of the offense, he is guilty of a misdemeanor; that it is not necessary, under this statute, to prove corruption, even in the case of a public officer, charged with doing an act without having acquired jurisdiction in the ordinary literal acceptation of the term as we understand it; but, if he intended to do the act, his intention constitutes all that is necessary to be proved. If a man does an act intentionally, he does it wilfully. Intention means will. When I intentionally do a thing, I do it because I will to do it. If this were a judicial act, then I think it would be necessary to show something further than just the doing of the act. But it is a ministerial act. The whole of Justice Bogart's duty, until he had acquired jurisdiction, was ministerial; like a justice issuing a summons and having it returned to him with the proper return indorsed. That is a ministerial and not a judicial act. His judicial duty did not commence until he could entertain the question of bail. He could not legally entertain that question until he got the papers, because the statute says he shall not act until he gets them. Then he cannot do a judicial act until he gets the papers. The act for which Justice Bogart is indicted is, taking bail without the prior performance of a necessary jurisdictional ministerial act. It is a general rule that, when a public officer is indicted for misbehavior in his office, and when the act done is clearly illegal, it is not necessary, in order to support an indictment, to show that it was done with corrupt motives. Nothing can be plainer. The question is, was this a judicial or a ministerial act? I charge you, gentlemen, that it was wholly ministerial; that all his acts are ministerial until he acquires jurisdiction in the case, and he does not acquire jurisdiction until he has before him all the papers which the eighth section requires before his right to act attaches. That is too plain to admit of any doubt. Here we have the law where the act was illegal, and certainly it was illegal for him to take

bail without having these papers and giving this notice. Where it is illegal, the proof of doing the act is evidence of a bad motive, and constitutes the offense. The question may arise, whether the defendant has the right, by proof upon his part, to show that he had no bad motive. The question for the jury is, was it illegal for him to take this bail without having these papers? Did he do that act? You will remember, gentlemen, that Justice Bogart has for several years been a judge, and these statutes he must have had occasion to know all about, for they concerned his every-day duties. It may be that he was unaware of the full force of this statute. It may be that he did not understand it; and that you may take into consideration, under all the circumstances, if there is any evidence tending to prove that fact, with the view to rebut the presumption of bad intention, arising from the doing of the act.

You will remember, by Mr. Johnson it is proved that, shortly after that act, he mentioned the fact to Mr. Johnson, stating that he had let this man to bail. Johnson told him he thought he had done wrong, but he (Bogart) thought he was right. It is for you, gentlemen, to say, from the fact of Bogart mentioning this to Johnson, whether you may infer it had been the subject of conversation before. Johnson says, "I think you have done wrong." Perhaps he may have talked the matter over before. Whatever you find upon that subject, it is submitted whether that is not evidence of an understanding, upon the part of Mr. Bogart, about this law; whether it is not evidence that he knew the law; whether he had not taken upon himself the responsibility of acting upon his own judgment, notwithstanding the law. That is for you to say.

Gentlemen, as I said before, if the counsel for the defendant have made any impression upon your minds favorable to the defendant, I, having told you what the law is, say (and I will make no comment upon the evidence which shall in any degree shake any impressions which the counsel for the defendant may have made), give him the benefit of those im-

pressions. I will give to the defendant the full benefit of a jury trial. Let the jury be the sole judges of his guilt or innocence, without any remark of mine upon the facts of the case. But it is my duty to tell you what the law is, and I have commented upon the fact only just so far as was necessary to show and to explain to you what the law is, and to apply it to the case. My opinion is that it is not necessary for the people to show anything out of the case in order to make out corruption or bad faith. That it being the doing of an official act, without the prior performance of a jurisdictional ministerial act, the fact that the act was illegal, that the officer was prohibited from doing it, except under certain circumstances, renders him chargeable with a knowledge of that law, and that if he did the act, the doing of the act is evidence of all the intent that is necessary to be proved by the People. If he has proved anything here that in your judgment would show that he, notwithstanding the legal presumption of intention, acted honestly and did not mean to do wrong, you may take that into consideration to rebut that presumption; but in doing that you must be careful not to allow any of the facts of the case which go to make up the essence of this crime to be lost sight of. Take the case, gentlemen; look at the facts candidly, in view of what I have said in reference to the defendant. Give him the benefit of every doubt resting in your minds; but at the same time that you do that, do not let your sympathies run away with your judgment, and lead you to acquit him in a case where, upon a full examination of the facts, and giving them all their true weight, he ought to be convicted, because the public have rights, and each of you are interested in the question as well as the defendant.

### THE VERDICT.

The *Jury* found the Prisoner *Guilty*.

The proceedings were stayed by a Certificate of Probable Cause by a City Judge, and the case went to the Supreme Court where, in the month of September, the verdict was affirmed by the Supreme Court and the *Defendant* sentenced.

## THE TRIAL OF ABRAHAM PRESCOTT FOR THE MURDER OF MRS. SALLY COCHRAN, CONCORD, NEW HAMPSHIRE, 1834.

### THE NARRATIVE.

In the year 1833 there lived in the family of Chauncey Cochran, a farmer, of Pembroke, New Hampshire, a young man eighteen years of age, by the name of Abraham Prescott, who had been well treated by Mr. and Mrs. Cochran and had appeared to be satisfied with his condition. He was not possessed of superior mental endowments,—indeed, he was below the average standard of intellect,—but being of an obedient disposition he had the fullest confidence of the family.

About the first of January, 1833, a singular occurrence took place: This young man got up in the night, made a fire, and with an ax struck Mr. and Mrs. Cochran on the head, as they were sleeping in the adjacent room. He then notified a person in the house of what he had done, and stated that he was unconscious of the act until he saw Mr. Cochran, covered with blood, attempting to rise. This was attributed to somnambulism at the time, and a statement to that effect was published in the Concord papers.

On the twenty-third day of June, of the same year, on a Sunday morning, Mrs. Cochran went out into the field near the house, with young Prescott, to pick strawberries, Mr. Cochran remaining in the house, reading. After an hour had passed, curious noises were heard at the barn. Mr. Cochran went out and found Prescott acting very strangely, who on being questioned regarding Mrs. Cochran, replied that he had struck her, and he thought had killed her. Mr. Cochran compelled him to go to the spot, where the woman was found, dragged into a clump of bushes, and just yielding her last breath.

Tried for the murder of Mrs. Cochran, the plea of insan-



ity was set up; and the counsel for the young man endeavored to convince the jury that he was a somnambulist and that he committed the act without being aware of what he was doing. But, after two trials, on both of which he was found guilty, he was hanged.

### THE TRIAL.<sup>1</sup>

*In the Court of Common Pleas, Concord, New Hampshire, September, 1834.*<sup>2</sup>

HON. WILLIAM M. RICHARDSON,<sup>3</sup> *Chief Justice.*

HON. JOEL PARKER,<sup>4</sup> *Associate Justice.*

HON. BENJAMIN WADLEIGH,<sup>5</sup>  
HON. AARON WHITTEMORE,<sup>6</sup> } *Judges.*

*September 9.*

Abraham Prescott, of Pembroke, New Hampshire, had been indicted by the Grand Jury of Merrimack County for the

<sup>1</sup> *Bibliography.* \*"Report of the Trial of Abraham Prescott on an Indictment for the Murder of Mrs. Sally Cochran, before the Court of Common Pleas, Holden at Concord, in the County of Merrimack, on the first Tuesday of September, A. D. 1834. Concord, N. H. Published by M. G. Atwood, and Currier & Hall. John W. Moore, Printer. 1834."

\*"Murder Trials and Executions in New Hampshire. Report of the Trial of Abraham Prescott, for the Murder of Mrs. Sally Cochran, of Pembroke, June 23, 1833. Executed at Hopkinton, January 6, 1836. Manchester, N. H. Daily Mirror Office. 1869."

<sup>2</sup> Richardson was Chief Justice of New Hampshire and Parker an Associate Justice of the Superior Court. Wadleigh and Whittemore were Judges of the Court of Common Pleas.

<sup>3</sup> RICHARDSON, WILLIAM MERCHANT. (1774-1838.) Born Pelham, N. H. Representative in Congress from New Hampshire 1811-1815. Removed to Portsmouth, N. H., 1814, and appointed Chief Justice of the Supreme Court of New Hampshire, 1816. Reported the early volumes of the New Hampshire Reports and was author of "The New Hampshire Justice" and "The Town Officer." Died in Chester, N. H.

<sup>4</sup> PARKER, JOEL. (1795-1875.) Born Jaffray, N. H. Studied at Groton Academy. Graduated Dartmouth. A. B., 1811. A. M., 1814. LL. D., Dartmouth, 1837, Harvard, 1848. Phi Beta Kappa (1826). Admitted to Bar Chester Co., N. H., 1817. Practiced law at Keene 1817-1821. State Representative, 1824-1826. Associate Justice Supreme Court, 1833-1838. Chief Justice, 1838-1848. Professor of Medical Jurisprudence Dartmouth, 1847-1857, Law, 1869-1871. Re-

murder, at Pembroke, of Mrs. Sally Cochran, on June 23, 1833.<sup>7</sup> He had pleaded *not guilty* at a previous session of the Court.

*Hon. George Sullivan*,<sup>8</sup> Attorney General, and *John Whipple*,<sup>9</sup> County Solicitor, for the State.

*Ichabod Bartlett*<sup>10</sup> and *Charles H. Peaslee*,<sup>11</sup> for the Prisoner.

moved to Cambridge, Mass., in 1847 and became partner of Horatio G. Parker, and Royall Professor of Law, Harvard, 1847-1875. Member Constitutional Convention, 1853, and of Commission to revise the Massachusetts statutes, 1855. President New Hampshire Medical Society and of Northern Society of Arts and Sciences. Author of numerous works. Among others, "War Power of Congress," "Right of Secession," "Non-Extension of Slavery," "Constitutional Law," "Revolution and Construction," "Three Powers of Government," "Conflict of Decisions." Died in Cambridge, Mass.

<sup>5</sup> WADLEIGH, BENJAMIN. (1783-1864.) Born Sutton, N. H. Lived on father's homestead. Served as Selectman, Clerk and State Representative; Justice of the Peace for 40 years and judge of the Court of Common Pleas from 1833 until disqualified by age. Noted for honest dealing and sound judgment. See Stearns' Gen. Hist. N. H.

<sup>6</sup> WHITTEMORE, AARON. (1774-1850.) Born Pembroke, N. H. Tradesman for a number of years and tavern-keeper; town Clerk and State Representative 1803; Judge Court of Common Pleas and also held many positions of responsibility in his town. See Stearns' Hist. Carter & Fowler Hist. of Pembroke, 319.

<sup>7</sup> He was indicted in September, 1833, and immediately arraigned at that term. Pleaded Not Guilty, and at his request Messrs, Bartlett and Peaslee were assigned by the Court to defend him. The case was continued until the February, 1834, term, at which time his counsel having made affidavit that several important witnesses were unable to be present, the trial was postponed until September, 1834.

<sup>8</sup> SULLIVAN, GEORGE. (1771-1838.) Born Durham, N. H. Representative General Court N. H. 1805-1813. Representative in Congress 1811-1813. State Senator 1814-1815. Attorney General New Hampshire 1827-1836. Died in Exeter, N. H.

<sup>9</sup> WHIPPLE, JOHN. (1789-1857.) Born Hamilton, Mass. Taught school in Gloucester, Mass., and studied law with Baruch Chase at Hopkinton; graduated Dartmouth 1812; practiced law in Dunbarton, Hooksett, Hopkinton and Concord; Assistant Clerk State Senate 1829-1832; removed to Concord 1833; Register of Deeds Merrimack Co. 1836; County Solicitor 1834-1839; Secretary of State for one term; Treasurer New England Fire Ins. Co.; Justice Police Court 1855-1857. Died at Concord. See Dartmouth Gen. Cat., 1769-1810. Bell, Bench and Bar of New Hampshire.

<sup>10</sup> BARTLETT, ICHABOD. (1786-1853.) Born Salisbury, N. H. Representative in Congress from New Hampshire 1823-1829; member

The following jurors were chosen and sworn after fifty-three had been called and twenty-one challenged: Joseph C. Thompson, foreman, Andover; Joseph A. Rowe, Andover; Wyatt Boyden, Boscawen; John Kimball, Bradford; Jonathan Bagley, Bradford; David S. Caldwell, Dumbarton; Nathaniel Webster, Salisbury; Stephen Purgray, Salisbury; Joseph Fifield, Franklin; John Rowell, Franklin; William Gay, Wilmot, and James Colburn, Franklin.

The *Clerk* then read the indictment, and said: "To this indictment the defendant has pleaded not guilty, and has put himself on the country for trial, which country you are; and you have been sworn to truly try the issue. May God send him a true deliverance. Good men and true—stand together—and hearken to the evidence."

#### THE OPENING SPEECH FOR THE STATE.

*Mr. Whipple.* You are called upon, gentlemen of the jury, for the first time in this county—and I fervently hope an occasion of the like kind will never again occur—to pass sentence upon the guilt or innocence of a person who stands here, charged with the crime of murder. At the last September term of this court, a bill of indictment was presented by the grand inquest of this county against Abraham Prescott, of Pembroke, for having feloniously, wilfully and with malice afore thought taken the life of the late Sally Cochran—a crime, gentlemen, revolting to the feelings of every humane and enlightened mind—a crime which, when committed deliberately, calls loudly for vengeance—a crime not only denounced by the laws of this state, but by the express commands of God.—"Whoso sheddeth man's blood, by man shall his blood be shed." "Moreover, ye shall take no satisfaction

State Legislature for several terms; member Constitutional Convention. Died at Portsmouth, N. H.

<sup>11</sup> PEASLEE, CHARLES HAZEN. (1804-1866.) Born Gilmanton, N. H. State Representative 1833-1837; Adjutant General New Hampshire 1839-1847; Representative in Congress from New Hampshire 1847-1853; Collector of Customs, Boston, 1853-1857. Died in St. Paul, Minn.

for the life of a murderer, which is guilty of death; for he shall surely be put to death."

As jurors, gentlemen, it becomes you to give your undivided attention and all your patience to every circumstance having any relation to this transaction. The public good, the safety and well-being of society, demand that a patient investigation should be had. For it is not only of vast importance to the prisoner, who stands here charged with a crime, for which his life is demanded, but it is of high importance to the public, and to yourselves, gentlemen, that your whole attention should be given to the law and the evidence which may be laid before you.

Your commiseration perhaps may be excited in favor of the prisoner at the bar, when you take into consideration his youth and his general appearance. These circumstances may have a tendency to excite your pity. But, gentlemen, let me ask you not to form any opinion in regard to him from any reports which may have been in circulation and which may have reached your ears, whether favorable or unfavorable. Everything of this kind you should lay entirely out of the question. And you are bound, gentlemen, to consider the prisoner innocent of the crime alleged against him, until he is proven guilty—for this is an established principle of law.

It will be incumbent on the part of the Government to convince you beyond any reasonable doubt that the prisoner committed the crime for which he is arraigned, before we can ask or expect you to pronounce him guilty of the offense. You have a painful duty to perform, and not only you, but every person in any way connected with this trial, must feel the weight of the responsibility resting upon them. But you must not forget, gentlemen, that a faithful discharge of your duty, painful as it may be, is beyond every other consideration. And I hope and trust that you will fearlessly and faithfully discharge that duty, regardless of consequences. Permit me to say that you may trust yourselves even with the life of a fellow-being. It is the law which has put him into your hands. And if you severally discharge

your duties with honest hearts and upright intentions, and with a full consideration of the law and the evidence which will be given to you—whatever may be the result of this trial—whether you pronounce the accused guilty, or acquit him—you will stand approved in your own consciences, and will have the pleasing reflection hereafter of having done no more on this occasion than the laws and your duty to society require of you.

I will now read the law applicable to this case, from the acknowledged authorities.<sup>12</sup>

It now becomes the duty of the Government, gentlemen, to prove the killing as alleged in the indictment; and I will briefly state to you the evidence we shall offer you in relation to that point.

We shall in the first place show you that the prisoner lived in the family of Chauncey Cochran, the husband of the deceased; that he had resided in the family for nearly three years preceding the commission of the homicide. We shall show you that the prisoner, on the morning of the twenty-third of June, 1833, between the hours of 9 and 10 o'clock, proposed to the deceased to go into a field a few rods north of the house, and in full view of the road, for the purpose of picking strawberries—that he made this known to the husband of the deceased—that the prisoner and the deceased left the house together, and went into the field where he proposed to go—that this field was in full view of the road, and of three or four houses. We shall show you that in this field there had been an abundance of strawberries, and that they were still plenty there. We shall also prove to you that the field in which the murder was committed had few or no strawberries; that it was about 70 rods distant from the house, and more than 100 feet lower than the field where they first went; and that the prisoner must have been fully aware of this, as but a few days previous he had been in this field in company with Mr. Cochran mending fence. It will

<sup>12</sup> Mr. Whipple read extracts from Blackstone and Foster's Crown Law.

also appear in evidence before you, that the pasture where the fatal deed was perpetrated was a retired and lonely spot, surrounded by woods on the north, east and west, and on the south there was no road or dwelling to be seen. In this place, so secluded and remote as to be beyond the reach of human voice, we shall show you that Mrs. Cochran was inhumanly murdered. It will appear in evidence before you, that on the spot where she was killed there appeared to have been a struggle—that the grass around the spot for a few feet appeared to be trodden down—that she was dragged from the spot where she was killed about two rods into the edge of the adjoining woods. It will further be proven to you that the prisoner, when arrested, had the marks of blood upon his garments; and, still more, that he confessed the bloody deed. When these facts shall have been clearly proven to you, as they will be, we apprehend all doubts will be removed that the prisoner at the bar is indeed guilty of the crime alleged against him.

#### THE WITNESSES FOR THE STATE.

*Chauncey Cochran.* Am husband of the deceased. Her death took place on Sunday, 23d June, 1833. About 9 or 10 o'clock in the forenoon of that day, prisoner came into the room where I was reading, and observed to me that Mrs. Cochran wanted to go out and pick some strawberries—asked if I would go with her—told him I was engaged in reading Avery's trials, which I had borrowed, and could not go. He then said he would go with her into my brother James Cochran's pasture, where the strawberries were plenty. This pasture lies westerly of my house, about 20 rods from the road, with a field between that and the road—four of five houses (mine among the rest) within about 30 rods, and in full view of this pasture; con-

tinued reading perhaps an hour and a half, when, on my mother's inquiring what made the noise she heard, I went to the door and heard a noise in the barn, where I immediately went, and found the prisoner sitting in the door of the shed at the further end of the barn, at the head of the lane leading down to the pasture; asked him what he was about; he said he had struck Sally (Mrs. C.) with a stake, and had killed her; asked him where she was; he said she was in the Brook field (the name of the pasture where she was found); ordered him to run and show me where she was; he was loth to go, but finally started, and on the way stated that he had the toothache, sat down by a stump, fell asleep, and that

was the last he knew until he found he had killed Sally. He then asked me if I would hang him; told him I believed the devil had got full possession of him; when we got to the place where her bonnet lay, he stopped and pointed in the direction where her body was concealed in the bushes; when I reached her she was just alive; ordered him to run for help; he refused; I sprang at him; he then ran on before me, and I hallooed till I alarmed the neighbors.

The scene of the murder was down under a hill; a spot nearly surrounded by trees and bushes; no house in sight in any direction; the place is quite low, about 150 feet lower than that where the prisoner proposed to go; the body of deceased was dragged about two rods from the place where she was killed, and concealed behind some bushes; a person must go within eight or ten feet before he would discover where she lay; prisoner must have been perfectly aware of the situation of this place as he worked with me eight or ten days previous in making fence, and was sent the very day before across this field after dark; there were few or no strawberries in this field; but they were more plenty in the field where prisoner prepared to go than any

where else in the neighborhood.

*Cross-examined.* My brother's pasture in some places comes within two or three rods of the spot of the murder. There were no strawberries near; there may have been five or six years before. People did not go there for strawberries, though it was about the height of strawberry time; no remembrance of my wife's having been strawberry-ing but once that season; Prescott first suggested to me the going after strawberries; did not notice the basket or strawberries on the spot of the murder.

*Mr. Bartlett.* Did prisoner ever before make an assault upon you or your wife? On the night of the 6th of January, 1833, prisoner got up, built a fire, and afterwards struck myself and wife on the head with an axe. The account was given us by prisoner himself; I and my wife were senseless for some hours; was wounded on the temple and Mrs. C. on the cheek; prisoner said he was unconscious of hurting us, and supposed he must have done it when asleep. First he knew of it, he saw me on my hands and knees on the bed bleeding; then called my mother and raised the neighbors. I was satisfied he did it in his sleep; so were my wife and the neighbors.<sup>13</sup>

Pembroke, Jan. 9, 1833.

Messrs. Hill & Barton: I was requested by Mr. Chauncey Cochran, of Pembroke, to give the facts relative to an unhappy and almost unheard of occurrence of somnambulism that took place in said Cochran's family on Sunday night last, that the public may not be led to form erroneous opinions respecting the transaction, and request you to publish the same.

<sup>13</sup> The following account of this transaction was published in the N. H. Patriot of Jan. 14, 1833:



A young man who had lived in the house of said Cochran for several years last past, retired to bed at an early hour for the purpose of rising early the next morning. He came out of his chamber between ten and eleven o'clock—took a candle, went into the clock room, came back into the room where Mr. and Mrs. Cochran slept at the time the clock struck eleven. He then obtained a buffalo skin from some part of the house and lay down before the fire—some time before twelve he got up, went into the wood shed, took an axe, came into the room which he left, went to the bed where Mr. and Mrs. Cochran slept (they being in a sound sleep), and gave each of them a severe blow or blows on the side of the head, which left them entirely senseless. He then returned to the entry, left the axe, and on returning into the room he awoke. Seeing Mr. Cochran trying to raise himself, and making loud groans, he took the candle, went to the bed, and found said Cochran and wife literally covered with blood. He then went into an adjoining room, where said Cochran's mother slept and informed her that he did not know but he had killed Chauncey and his wife. As soon as Mrs. Cochran could get out of bed she went into the room and found them in the condition before mentioned. The neighbors were immediately called in, and the subscriber, who has afforded all the medical aid in his power, can now state that said Cochran and wife have so far recovered that hopes are entertained of a speedy recovery. Yours respectfully,

Samuel Sargent.

The COURT. Had prisoner been in the habit of getting up in his sleep? This is the only time I ever knew of. Did he make any attempt to escape? No, he remained about home, as usual.

Mr. Bartlett. What did you say to him when you conversed on the subject? Did he appear to regret the occurrence? He appeared to be very sorry; I believed it; told him he ought to be very thankful that he did not kill us; he made no answer; would look down, and was not inclined to talk about it; there had been no misunderstanding between prisoner and myself or wife; he had resided three years in the family; his deportment was very good; he was obedient and kind; have known him to get water instead of my wife, after she had started for it; pris-

oner was eighteen years old the same month of the accident; always thought he was bad tempered; sometimes abused the cattle; never quarreled with any of the family; always treated the children affectionately, and never refused to perform labor; we never put anything hard upon him after he had done his day's work; I always stated he was good and capable; never complained till recently of his bad temper; don't know that I requested others to refrain from speaking to him of the winter transaction; never censured him for it; gave him no money to appease him; my wife never requested me to go strawberrying; never said she did; did not hear him ask her to go; gave him no leave to go; do not know where he went while I was alarming neighbors; never heard Mrs.

Cochran complain of any rudeness to herself in the prisoner; had been absent several times two or three days each; a short time before the murder I was absent and left only Mrs. Cochran, two small children, and a girl ten or twelve years old, with the prisoner; don't know that prisoner ever accompanied wife in the evening; have known him to accompany her home from her father's; had been below four or five weeks previous to winter occurrence; nothing said at that time of killing hogs; wife generally washed early Monday mornings; prisoner not generally required to make fire; when she washed he often got up; never knew anything in his conduct to induce me to suspect the winter affair to be an attempt at murder; know of no motive for his conduct. There could not have been any strawberries at or near the spot where deceased was killed; prisoner sometimes had beat my cattle unmercifully; had reproved him often for that, and on such occasion he never made much reply; generally looked down and cross; had latterly grown rather more severe in his treatment of the cattle; the doctor informed me if the blows of 6th of January had been on the back part of my head they would have been mortal; don't recollect whether prisoner was present.

*John L. Fowler.* Am Coroner. In the morning of 23rd June, 1833, Mr. Robinson informed me of the murder; immediately went to the place, which I reached between ten and eleven; found Mrs. Cochran dead; then asked for the prisoner; ran to the house and inquired for him; found him in James Cochran's pasture,

where I arrested him; asked him what he had been doing; he told me he had killed Mrs. Cochran; asked him how he had killed her; he said with a stake; asked him why and if he had any cause, or if there had been any uneasiness between them; he said no; he didn't know why he killed her; on Thursday after he was arraigned, last September, went to the prison to see him, and told him he had better confess the whole truth; at first he declined making any disclosure, but finally said he would before Major Stinson, warden of the prison, and myself, if Thompson, the deputy warden, would remove M'Daniel, another prisoner who was present; this was done, when the prisoner stated that he and the deceased went into James Cochran's pasture together; from thence down into the Brookfield; that when about to return homeward he made her a proposal which she indignantly repelled, called him a nasty, dirty rascal, and said she would tell Chauncey (her husband) of him, and he should be punished; prisoner then sat down by the stump; considered his situation; thought he must go to jail for his offense, and had as lief die as go there; saw a stake near him, caught it up and killed her; she was picking strawberries at a little distance and probably was not aware of his approach; she made no ado; the blows were fatal; prisoner said he had as lief die or be hung as go to prison; was at the spot of the murder; the grass was trodden down very much; appeared as though there had been a scuffle at the place; a hair-comb, one tooth broken out, basket of straw-

berries and calash, were within six or eight feet of the place; the blows were on the back part of the head of deceased; there appeared to have been two blows; the wounds were deep; might lay in your three fingers; one was on the right and the other on the left side, running to the back part of the head; the comb was a common large one, such as women wear on the back part of the head. There was no blood on the calash; one of her earrings was out, the other in her ear unlocked or open; identify the stake shown as the instrument of the killing; it was about three and a half feet long and broken; there was blood on the stake, which lay where the scuffle appeared to have been; the body was dragged twenty-nine feet northwest, into some bushes, about twelve feet from brush fence, secreted from view except in coming from the south; she lay on her back.

*Cross-examined.* M'Daniel was in the prisoner's room when the conversation commenced; can't recollect exactly what was said first; he stated, however, that he was asleep when he killed the deceased; told him that story would not do, that I thought he had a motive, and that other people thought so; told him I wanted to satisfy my own mind, and should like to have him state the whole truth to me, just as it was; his confession would make no difference; Major Stinson said he would stand a better chance of pardon if he confessed; prisoner then said after Thompson and M'Daniel went out he would tell the whole story; never made any other confession to me; M'Daniel remained

five or ten minutes in the room after I went in; first saw the prisoner lying down in the pasture, making a kind of moaning noise; six or seven persons had been at the place of the murder before I got there; never offered a wager that the prisoner would be hung or wagered or bet he would be hung; the shirt, waistcoat and pantaloons are the same the prisoner had on when arrested; they were bloody; did not take them off myself but saw them taken off, and have kept them ever since.

*Mr. Bartlett.* What did the husband of deceased say when you told him of the prisoner's confession? The Attorney General objected. The COURT ruled the answer inadmissible.

*Jonathan Robinson.* At a quarter to ten I reached the place of murder; there were five to eight persons there; examined the spot, had the appearance as if deceased had been knocked down; grass not trodden down anywhere else.

*Cross-examined.* Am nearest neighbor of Mr. Cochran; live within eighteen rods of him; have lived there all the time prisoner has been at Cochran's; have heard of him being a pretty rough fellow before he came to the neighborhood, but not since; never heard Cochran speak an unfavorable word of him, and never knew but they lived in harmony. The spot I examined was where comb, calash and basket lay; kept people off the spot as much as possible.

*Dr. Samuel Sargent.* Am a physician. Arrived at the spot a little past eleven o'clock; saw the situation of the deceased; but did not examine her wounds,

particularly until after the jury of inquest had been summoned, and then in the presence of Doctor Pillsbury. There were two wounds on the back of the head; one on the right side, almost three inches in extent, the scalp cleaved from the skull from two to three inches in width; the skull fractured and compressed upon the brain; the wound on the left side two and a half inches long, and one and three-fourths to two inches wide; the skin broken and skull fractured from the occipital to the temporal bone; there was a slight wound on the right side, near the temple; there were probably three blows; death must inevitably ensue from the wounds described. Went from my house to the spot in about twelve minutes; she had been dead, as I was informed, about fifteen minutes.

*Cross-examined.* I was at Chauncey Cochran's on the 6th of January, 1833, at five minutes before twelve at night; staid about three hours; found Mr. Cochran and his wife both badly wounded and insensible; they remained so when I left. In six or seven hours saw them again, when they had partially regained their senses. Mr. Cochran was wounded severely on the right temple; his eyes swollen so that he could not see; Mrs. Cochran

was bruised from the nose across the cheek. Prescott was about there, his appearance much as today, and he sometimes expressed anxiety and moaned. I prepared, at the request of the family and neighbors, an account of the case for the "New Hampshire Patriot," and my name was signed to the article. I thought it probable he got up in his sleep; knew of no difficulty in the family.

*The Attorney General.* Did you state in the presence of the prisoner that the wounds of the 6th of January, if on the back of the head, would have been mortal? Prescott was present at the time.

*THE CHIEF JUSTICE.* Did the wounds of the deceased meet at the back of the head, or were they more upon the side thereof? The wounds extended from each side of the head to within about three-fourths of an inch of each other on the back of the dead. There was about three-fourths of an inch not separated or cut.

*Dr. John Pillsbury.* I have heard the testimony of the last witness. His statement is exact as far as it goes. Well recollect stating to Cochran that if the blows of the 6th of January had been on the back of his head, they must have been fatal. The prisoner was within hearing.

The *Attorney General* stated the State would rest the case for the present.

**MR. PEASLEE, FOR THE PRISONER.**

*Mr. Peaslee.* Gentlemen of the Jury: The prisoner at the bar is charged with the crime of murder, and you are to determine in calm deliberation, in sober judgment and cold

blood, whether he is guilty of an offense punishable by death. If then, as Jewish teachers inculcated, places of devotion, the vases and everything connected with our church establishment, should be deemed holy and sacred, never could this house be appropriated to more solemn and legitimate purposes than on the present occasion, viz., the administration of justice, and the exercise of the highest earthly power over our fellow-man.

The vast number who have assembled, taking cognizance of our proceedings, desirous that impartiality and equity should be administered,—constantly reminding us by their presence that the life of a fellow-being is at stake, and who will retire with increased or diminished respect and attachment to our institutions, confident of a fair trial, however monstrous and unnatural may be the crime of which they in turn may be accused—and secure of the protection the laws afford them against an ignominious death, so long as their motives are pure, although they may not be secure of a ray of reason to guide, or of consciousness to bind their actions; or else with feelings of insecurity and distrust—the momentous consequences of the matter now pending upon the prisoner at the bar, and with all our duty to ourselves (else reflection may come when reflection is too late)—these considerations should indeed characterize our proceedings with candor and solemnity; should hinder you, gentlemen of the jury, in particular, from being influenced by the thousand rumors which have been circulated, and some of which have no doubt reached your ears; should restrain witnesses from saying anything lightly, heedlessly, or from prejudice—and all of us from doing aught unbecoming a court of law and justice in a civilized and enlightened community.

I know it has been often said, men derive greater advantage from opulence than virtue, that few there are even in our halls of justice who can coolly distinguish between the metal and the man; but if in some places the individual in high life would excite public sympathy and be pitied for his misfortunes, while the penniless man under similar circum-

stances would be hurried to sufferings; even if frequently the objects of the law are that unfortunate and helpless class upon whom oppression can be most easily exerted: yet it cannot be that, in this boasted land of impartial laws, an individual, if but arraigned from the humble walks of life, will be on that account presumed by those engaged in the dispensation of justice, to be steeped in the blackest guilt; it cannot be with us that a person, if only poor, need but to be accused of an enormous crime to be silently dragged to the gibbet.

No, gentlemen, we have felt emboldened to proceed in this trial, and to state to you the prisoner's defense, confident that it will be candidly listened to, that he will receive without prejudice the consideration to which he is legally entitled (and he asks of you no more), notwithstanding the fearful odds here placed before you: the strong arm, the whole power, of the Government, backed by industrious and wealthy individuals and men of high-sounding commissions and professions, testifying and ferreting out testimony, on the one side; while, on the other, stands only the helpless youth whose life, whose all, is in your hands, incapable at best of affording counsel assistance in preparing his defense from his confinement to a dungeon, but utterly so from the nature of his disease; and though most may wish he should have a fair and full trial, yet he could be particularly befriended in obtaining this only by imbecile old age, decrepitude, and pinching poverty. You may have perceived from allusions to confessions, in the opening of this case, with what feelings the prisoner has been pursued; we mean not on the part of the relations of the deceased, for counsel compassionate them in their bereavement sincerely as anyone, and if we may not, like the prisoner at the bar, be willing freely to give up our life to restore hers, still we would make any sacrifices, were it in our power to afford relief—but we mean on the part of those witnesses, if there are such to be brought forward, who, whether from a feverish ambition to make themselves conspicuous, or from a more culpable motive, have lurked about the prisoner's



cell to get the sayings of an insane man, to produce his conviction; but which, it will be argued, ought to produce a contrary effect, viz., a confirmation of his innocence. For we shall prove to you that real lunatics are desirous, that it is frequently characteristic of them to be desirous, of being deemed free from the malady, and that they often assiduously endeavor to conceal from observation the lapses of thought, memory and expression which tend to betray them, while the feigned, of course, never desire to conceal it. Real lunatics are willing you should impute their acts to malice or any cause besides the true one, their madness; while the feigned fear nothing so much as that they shall not be able to keep up the deception. Besides, it will occur to you that there is implanted in the breast of every man these two conservative principles to restrain him from acts of violence, viz.: a horror at taking the life of another, and a dread at parting with his own. And these inexplicable feelings have been given us so strong, that it is not possible for any human being, unless he has long been familiarized with vice and changed by habit entirely his nature, to overcome the constant operation of either, and never at once of both, under the strongest temptations. And no man need be in the least afraid to risk his life on this issue, viz.: whether it is possible for any person educated, and with the habits and character of the prisoner, and surrounded by such circumstances, all at once to break over both these mountain barriers; to murder while of sound memory and discretion, in cool blood, without motive or provocation, his best friend, and then immediately furnish evidence to bring himself to the gallows. You may say, it would be possible, did he but will to do it; but that is the question, and it would be as impossible for any person under such circumstances, while in full possession of his reason, to will to commit the crime and then take means to procure his own condemnation, as it would be to change the nature of man or to make a world. Well, the sayings of the prisoner, then, instead of showing guilt, give additional proof of his derangement, and innocence.



Surely it had been enough on the probability of his insanity on the face of the transaction, to thrust him forth from the world and make him the companion of state prison convicts; the associate of persons not only of all colors and degrees of crime, but of all complexions; and there he might have been permitted, fettered, bound and helpless, to have remained, if unsolaced and unadvised, at least unhunted, until he was put upon trial and proven guilty or innocent, in the ordinary way, for the world is never the friend of the accused, nor the world's law. But, gentlemen, if the prisoner has had no industrious, capable friends to aid counsel in making his defense, and to meet the extraordinary exertions made against him, we have no doubt you intend to give full weight to whatever shall be produced under such unfavorable circumstances, and that you will not condemn him unheard and untried; but, notwithstanding your intentional candor, I would caution you against the danger of a secret influence to which we are all liable: that is, of your suspecting the guilt of the prisoner barely from the accusation. You should try this case as though you never before heard of it. A man may be innocent and yet liable to suspicion. And as there is nothing more common among those who crowd around the bodies of persons found dead, than to suspect they have been murdered, and to hunt up or imagine circumstances to favor such a belief, and to fix the crime upon some person whom they suppose most liable to be guilty, which idea if untrue is permitted to gain strength by repetition and exaggeration, so there may be danger of accusation, of bare presentment for trial, being taken for evidence of guilt. There is also danger of the imputation of a crime which, if true, considering the relation of the parties, is almost unparalleled in enormity in this or any other country, and which should therefore render more improbable the guilt of the youth arraigned, more certain his defense. There is danger of this circumstance unless you are on your guard, instead of operating as it ought, to cause you to demand stronger proof, and to bear in favor of the accused, until he is clearly proven guilty of its having a

direct contrary tendency. There is another secret bias you may have obtained by the exhibition made before you this morning of the bloody garments and instruments of death from their connection with the prisoner; such exhibitions are like the ancients producing their weeping wives and children in courts, baring their arms and showing the scars they had received in their country's defense, to influence the jury and to get a verdict. They are a kind of silent eloquence, as is perfectly understood, by counsel in behalf of the State, which has an effect upon the feelings of mankind; beyond that produced by the most accomplished orators; and in this instance powerfully calculated to rouse an indignation unfavorable to the cool deductions of reason and the investigation of truth. No one will deny the almost unbounded influence of our feelings over our judgments, and that our passions and prejudices may be more powerfully stirred up by any material object that strikes the imagination through the senses than by any set form of words. You should, then, be on your guard, lest in the outset you receive a prejudice which may lead your better judgments astray through the whole case, by the dramatic exhibition, if I may so speak, made before you. But if from the darkness in which is enveloped the subject of insanity, particularly in this State, inasmuch as we have not, like some of our sister States, an insane hospital, furnishing a school for the knowledge of lunacy, or in any part of it collected together, as in populous cities, a large number of learned surgeons, physicians and apothecaries, diffusing the result of their experience and information to the whole community; if from an over-zealous anxiety that someone should be sacrificed for the loss of a valuable citizen, if influenced by popular rumor, if transported with indignation because the deceased was an amiable female; if thinking that the first man brought to the bar of the county for so heinous a crime ought to be condemned, or from a combination of similar causes we are hurried forward as were some, no doubt, well-meaning citizens of an adjoining town, who wished to swear to the sanity of a man who had been a long time under guar-

dianship for his known insanity, and were indignant that he was not indicted, tried and convicted for murder, when he was beyond all doubt insane in the mind of every person acquainted with the subject—if, I say, we are led away and governed as were these men, then indeed will this trial be a bare mockery, and the temple of justice will be perverted to the most unhallowed of all purposes, and these walls in which have been so often commemorated the death, and thereby brought to mind the judicial murder, of our Savior, may serve to remind the occupants of their having been appropriated on one occasion, to any purpose except the merciful principles He inculcated. Surely, gentlemen, I mean no disrespect, but judges, jurors, witnesses, counsel, all are but erring men, and in a case too well calculated to inflame, at the first blush, our passions and prejudices, what man dare say his judgment will remain clear, unclouded, and unbiased, or who will not acknowledge that, when he has been once strongly excited against an individual, it is difficult, almost impossible, to contemplate his case with candor, and to do him justice? I therefore conjure you, as you value your peace and happiness—for painful indeed would be the thought that you had condemned to death an innocent man—to keep a watch over your own frailty, for the responsibility finally rests upon you; you are emphatically the judges of the law as well as of the fact.

What, then, is the offense of which the prisoner stands accused? What are the necessary ingredients to constitute the crime of murder, all of which, as laid down in the books, must be united, that you can give such a verdict as to take the life of the prisoner?

“Murder is therefore now thus defined, or rather described by Sir Edward Coke. When a person of sound memory and discretion unlawfully killeth any reasonable creature, in being, and under the king’s peace, with malice aforethought, either express or implied.”  
—*4th Black. Com.*

“To constitute murder, then, these circumstances must concur—the agent must be of sound memory and discretion—there must be an unlawful killing—the sufferer must be a reasonable creature,

under the king's peace, and alive and *there muse be malice*, either express or implied in the slayer."—2 *Chitty's Crim. Law*, p. 476.

"*There must be malice, either express or implied.* It is this circumstance which distinguishes murder from every other description of homicide, especially from manslaughter, which comes nearest to it both in guilt and punishment."—2 *Chitty's. Crim. Law*, p. 480.

"Lastly, the killing must be committed *with malice aforethought* to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing."—4th *Black. Com.* p. 198.

Not every killing of a human being, then, is murder. There must, as the indictment, your textbook, alleges, be malice aforethought, and this is the very essence of the crime; it must be done feloniously, wilfully, with a deliberate design, a premeditated purpose, otherwise the crime of murder has not been committed.

"It must be committed by a person of sound memory and discretion; for lunatics or infants, as was formerly observed, are incapable of committing any crime."—4 *Black.* 195.

"Madness is another cause which may render a man incapable of crime, and where it amounts to a total perversion or obscurer of the intellectual faculties, is an excuse for any enormities which may be committed under its influence."—2 *Chitty.* 477.

"It is agreed by all juries and is established by the law of this and every other country that it is the reason of man which makes him accountable for his actions; and that the deprivation of reason acquits him of crime. This principle is indisputable."—*Erskine's speeches*, 499.

The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is that a *mad-man is punished by his madness alone*. In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no not even for treason itself."—4 *Black.* 24.

"Where, however, the mind labors under such a delusion, that, though it discerns some objects clearly, it is totally deranged as to the objects of its attack, the party will be entitled to an acquittal."—2 *Chitty. Cr. L.* 477.

It is clearly then recognized by the law that whenever there is a defect of understanding as in case of injuries committed by persons in a state of lunacy, somnambulism, or idiocy, no offense has been committed.

Idiots, madmen, persons not at the time in the full possession of their reason, such as somnambulists, are excused, whatever injuries they may commit.

A madman, as the law says, is punished enough by his madness alone, for should you bring in the prisoner not guilty, by reason of insanity, he must be consigned to the prison walls in effect for life; his only physician and nurse the jailor; his only medicine, bars, bolts, and manacles; his only soothing ministers to a mind diseased, the mockery of criminals, treated as a miserable outcast from God and man, condemned, to be sure, not to the disgrace of the gallows, but to a lingering death, to uninterrupted misery; last of all, must pay the expense if he has property. I am thankful that at least the days for the punishment of witchcraft are past with us, and that we do not as in Java, turn lunatics, who have no property, into the street and invite all to stone them to death; and I was glad to see, a year or two since, the indignation manifested throughout our country at the inhuman judicial murder of the amiable Captain Paddock, at Valparaiso, for an act done by him in a sudden fit of derangement, and that our newspapers did call upon our Government to inflict exemplary punishment upon the bloodthirsty authorities there who, under a show of trial, either from ignorance or barbarity, were in fact but ministerial agents binding and conducting their victim to execution; for it shows that public opinion is becoming more enlightened and correct on this subject, and that the time is fast approaching, if it has not already arrived, when persons, however violent their symptoms, however shattered their judgments, however malicious their propensities, however reckless their passions, by reason of insanity, can be tried without prejudice, without being pursued by the vindictive spirit of revenge, first to the recesses of their dungeon, and from thence to the halls of justice.

Well, gentlemen, it being necessary in order to make the killing of any person a murder, that the party who did the act should be a person of sound memory and discretion, and that the killing should be done with malice aforethought—

what next does the law demand at your hands? Why, that you should set out with the presumption of the innocence of the prisoner, and that you should not yield that presumption unless upon the whole evidence in the case all reasonable doubts are removed from your minds. What kind of proof does the law require? To what certainty must the evidence bring you? That the party accused not only did the act, but that he was of a sound memory and discretion, and that it was done with malice aforethought, before you can convict. Can you for a moment balance between probabilities as in a civil cause, and decide this way or that, as the scale shall turn? No, Mr. Foreman, twelve men do not, cannot, hold any such power over your life or mine, nor have you gentlemen any such right to presume, to guess, at the guilt of the prisoner at the bar.

"It may also at this day be considered a rule of law, that if a jury entertain a reasonable doubt upon the truth of the testimony of witnesses, given upon the issue they are sworn well and truly to try, they are bound in conscience to deliver the prisoner from the charge found against him in the indictment, by giving a verdict of not guilty.

"Sir Edward Coke, *in favorem vitae*, exhorts juries not to give their verdict against a prisoner, without plain, direct and manifest proof of his guilt, which implies, that where there is doubt, the consequence should be acquittal of the party on trial.

"This reasonable doubt may result from various causes extrinsic of the evidence given upon oath; for a witness may be perfectly competent and swear positively to a charge, material to the issue trying, and yet not deserve credit from the jury.

"Therefore, wherever the evidence warrants the observation, the judges consider it an indispensable duty in charging the jury, to remind them that as they are intrusted with the administration of public justice on the one hand, and with the life, the honor and the property of the prisoner on the other, their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves whether they are satisfied, beyond the probability of doubt that he is guilty of the charge alleged against him in the indictment.

"And however strongly you may suspect the prisoner, yet it were better that one hundred guilty persons should escape, than make a precedent by which one innocent man might be found guilty upon such testimony!

"And if there be a doubt, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit the prisoner. For, in that case, the impression made on your minds, can at most create

a strong suspicion of the prisoner's guilt—but that is not sufficient to convict him.

"But I will go further, and say, if you have a doubt upon that question; if your minds be in a state of oscillation, you ought in that case to acquit the prisoner; because to justify a verdict of conviction to yourselves and to your country, the evidence upon which you decide should be above exception, and not evidence upon which you entertain any doubt.

"However trite it may be, I must remind you of the maxim founded in humanity—that if you have any *rational doubt*, then, as fair and honorable men, you must acquit."—*Macnally's Rules of Evidence*, 2, 3, 4, 5, 6.

"The best rule, in cases of doubt, rather to incline to acquittal than conviction."—1 *Hale, P. C.* 509.

"It is better five guilty persons should escape punishment than one innocent man should die"—2 *Hale P. C.* 289.

"It is safer to err in acquitting than in punishing—rather on the side of mercy than of justice."—*Ibid*, 290.

This is not the language of an attorney pleading the cause of his client, nor a one-sided, unsettled view of the law applicable to this case, but such as you are bound by your oaths to adhere to. Wretched indeed must be the country where even in cases of petty larceny, any person concerned in the administration of justice ever loses sight of this great maxim or principle of law, that in hesitation and doubt, the party should be acquitted, that no man should be convicted of an offense without the clearest evidence of his guilt. The civilians go so far as to say that the evidence should be *lucē clarius*, clearer than the light itself: but in the most moderate language of the law, it should be clear, full and satisfactory. If a reasonable doubt can be raised, that doubt must be decisive for acquittal. You may say then that the verdict in nine cases out of ten means no more than that the guilt of the party has not been demonstrated beyond a reasonable doubt. Be it so—the humane spirit of the law does indeed multiply the barriers for the protection of innocence and freely admits that these may be abused for the shelter of guilt. It prefers that at least ten guilty should escape rather than one innocent man should suffer. Acquittal in no case invests a man with any power or privileges; it surely can give him no public confidence or restore the dead to life, and, in this instance, should the prisoner be acquitted by reason of insanity, he



would be consigned to all the punishment a large class of our citizens believe, were he even guilty of murder, to be authorized either by the divine law or by public policy.

Whether the opinion advanced in the opening of this case, that the Deity requires the punishment of a murderer by death, be correct or erroneous, you should convict no man of an offense for which is to be exacted so dreadful a penalty without great caution and deliberation—if you are to err on either side, surely you should err on the side of that mercy which is an attribute to God Himself. The Solicitor has quoted the text so much relied on by the advocates of capital punishment, “whoso sheddeth man’s blood, by man shall his blood be shed,” but notwithstanding this phrase, at the first blush, may appear to favor the belief that the punishment of murder by death was instituted by the Deity, it is extremely doubtful, as annotators say, whether human murderers are here referred to—there is indeed great reason to suppose that man is here simply permitted or commanded to kill any beast that shall occasion the death of a man. The text literally rendered, it is said by able commentators, decides nothing; for the Hebrew word, translated “whoso sheddeth,” is a present participle corresponding to the English word shedding, and we have as good right to supply the ellipsis by whatever, as whoso or whoever. By interpreting this text, so that a beast and not man was intended, would suit the whole connection; for in the preceding verses vengeance is denounced upon the beast that occasions the death of a human being, and the whole passage seems to refer to the relation in which man stands to the lower order of creation, and such a construction is borne out, and comports with similar sentences, requiring the sacrifice of any ox that causeth the death of a man or woman. Why, the punishment of the first murderer, Cain, by death, was so far from being encouraged by the unchangeable Deity, that he set a mark upon him, lest any finding, should kill him. The temporal punishment of a most aggravated murderer was taken in this instance into his own hands, and if death was the only suitable one for all periods and

under all circumstances, why was it not at that time inflicted by Him who cannot change?

The criminal was brought to the bar of God, tried and condemned, to what? to the gallows? to death? No, but to live. Spared, too, under the awful sanction that, whoso slew him, judgment should come upon him seven-fold. The first law on record, then, against murderers, was made to preserve the life of the murderer. On Mount Sinai, too, was given the law, Thou shalt not kill. It may be said, this means thou shalt not murder, but may kill the murderer. But we must remember that the first law was made to preserve the life of the murderer.—Giving these passages such a construction would not contradict the one “whoso sheddeth,” etc., even if it does refer to man—for it may mean no more than that such a person is in danger of having his own blood shed. It might as well be contended from the text, “whoso leadeth into captivity shall be led into captivity,” that every captain of a slave ship, or every Southern planter should be punished by similar slavery, and that only which he had occasioned, as to say from this passage, that death and death only is the punishment authorized by the Deity, for the murderer. Both passages, like the one in the New Testament, “whoso taketh the sword shall perish by the sword,” may be said to be predictions rather than commands. But supposing the passage, “whoso sheddeth,” etc., does refer to man, and that it is a command, it would not authorize, as it has been well said, the present mode of killing murderers through the medium of judges, juries, sheriffs, and by public executioners. Whatever vengeance is required by that precept, as commentators say, is required by the context to be taken by the brother or nearest relation of the person murdered. Hence, the custom to this day, of Jewish widows carefully preserving the bloody shirts in which their husbands have been killed, for the purpose of displaying them at certain epochs of the year before the eyes of their children, at the same time exhorting them to revenge the death of their father as soon as age and strength should permit them to do so.

But this mode of punishing murder would, by our laws, be punished as severely as murder itself would be. At all events, a new and better dispensation has been given to us than that which existed among the Jews, a bloodthirsty and vindictive people, fond of everything like harshness and severity, and among whom many customs might have been tolerated, as our Savior said, when questioned upon that subject, "from the hardness of their hearts." Christ did not, to be sure, enact a system of jurisprudence, or point out all the defects in human governments: for it was no part of His mission to do so; but the whole spirit and tone of the merciful principles he inculcated, so far from ratifying, are directly at war with this exterminating practice.

Capital punishments had their origin in the principle of revenge, but the gospel requires the injured party to abandon such a spirit, to bring no punishment to the aggressor from such motives. He is commanded to forgive the injury as done to himself, and no farther to insist on punishment than is necessary to the public good.

The law of retaliation is to be made consistent with the law of love, and this seeks the welfare and reformation of the offender, so far as it can be done consistent with the safety and security of society, and not to feed private revenge. Was it under the Mosaic dispensation tolerated, for the nearest relative of the murdered person to avenge his blood, and was this the only way in which death was allowed to be inflicted upon murderers even then? We are commanded to "avenge not ourselves." It is not for us to look into the bosoms—to search the hearts of others and fix upon the degree of punishment or vengeance due to their motives. It is not for us to say, even to the murderer, you have forfeited all claim to human and divine mercy: we will therefore cut you off from every chance of reformation, from every opportunity of repentance—we will hurry you before the spotless throne of God, with your hands imbrued in blood, lest by living you should find favor in the sight of Him who came to save and not to destroy; and who (were it not for our interference,

in depriving you of your probationary existence) might make your sins, though they be as scarlet, white as snow.

However sunk may be a man in vice, he is not given up for lost by Him who stretched out His hands to the whole human family; but beckoned back to the paths of virtue, and treated as a being capable of moral feeling and of reformation. But what chance is there for reformation between the sentence and execution? Certainly, by depriving him of time and opportunity, then, we go counter to the character, nature and infinite destiny of man, as taught by Christianity.

Whatever may be inculcated as to a future state of existence, there is no belief, authorized by revelation, as to what may become of us hereafter, from which can be drawn arguments to justify our being instrumental in unnecessarily hurrying a fellow-being into "that undiscovered country, from whose bourne no traveler returns." Are there any who think that to the wicked there shall be a never-ending, indescribable misery? It would be well for such to commune with their own spirits and consider whether they ought to be over-anxious to seal such condemnation upon even a criminal, when by allowing him the time allotted by his Creator, he would have escaped such terrible punishment. Are there any who think there is to be no suffering hereafter; that He, who said to the malefactor on the cross, "This day shalt thou be with Me in Paradise," hath prepared mansions in His Father's house for the whole human family? Such would not say that he who hath outraged all society, does thereby an act for which they are anxious to relieve him from the ills to which human flesh is heir to, and advance him immediately to the abodes of bliss.

If, then, the Jewish laws, adapted to the peculiar circumstances and situation of that people, cannot be considered as binding upon us—if it would probably have been republished in the Christian code, had it been of religious obligation for us to inflict death, and if no positive instructions can be adduced from the New Testament in favor of it—if the legitimate objects of human punishment cannot be so well secured

by taking of life as they can be by imprisonment, why, surely, gentlemen, you will not imagine that you would be doing God service, in this particular case, to disregard that maxim of the law which requires that you should be satisfied beyond a reasonable doubt, before you can convict; and which has ever been approved and practiced upon by our wisest and most experienced judges. Neither the texts of scripture, introduced by the Solicitor, or the good of society, require that you should strain your oaths or hastily decide upon such a verdict as should occasion a spectacle which, so far from operating to deter men from the commission of crimes, would have a tendency to increase them. Suicides have been ascertained to keep pace, to bear proportion, to public executions. The Rev. Mr. Roberts, of Bristol, who visited many convicts under sentence of death, ascertained that in 167 instances which came under his immediate observation, 164 of the malefactors had been eye-witnesses of public executions, before the commission of the crime for which they stood condemned to the same ignominious punishment. The increase of population, in England, from 1801 to 1821, was a little more than one-sixth, while the number of commitments during the same period nearly quadrupled itself, notwithstanding her long list of offenses, punishable with death. But in New Hampshire, New York, Pennsylvania and New Jersey, where confinement has been resorted to for most of the same offenses, the number of commitments have not increased so fast as the population, and in some of them, while the population has increased one-sixth, the commitments have not one-twentieth. Many persons are to be sure collected to witness public executions—but some to pick pockets—some to gamble and fight—some for noisy festivity, and but few for better purposes than to get drunk with the excitement—with the horrid pleasure of witnessing the last agonies of a fellow-being, swung between the heavens and earth. If the witnessing of such a scene is not sufficient to deter men from the commission of smaller offenses on the spot, nay, more, if it rather invites them—and even murders have been committed under the very gal-

lows—who will believe that it would operate to deter them at a remote period? Surely, then, it would be better that at least ten guilty persons should escape, by reason of supposed insanity, than one innocent man should suffer; especially when it is considered that even then they would be held up a living and continued example, to deter others from the commission of similar offenses—would be haunted day and night by the bosom fiends that torment, and the furies that distract—would be given up to the stinging mortification, the horrors of self-reproach within, while the gaiety, liberty and bustle of all without would serve to aggravate their misery, and thus feel the anguish of a torturing conscience, until it did its perfect work (for the pain which they suffered would be an incentive to reformation and repentance), or until Him who gave life, took it.

Where a murder is alleged to have been committed, and the killing is proved, your first inquiry (in order to ascertain whether it was done by a person of “sound memory and discretion, and with malice aforethought”) should be into the motive of the accused. If, as you have been told, the law presumes malice from the fact of killing, this is a presumption, which may be rebutted by evidence, and of the sufficiency of that evidence you must be the judges. Unless the deed be accompanied by circumstances proving deadly malice, unless the facts attending the transaction be such as to evince that it was maliciously done, and to confirm the implication of law, you cannot be satisfied beyond a reasonable doubt, that the very gist of the crime, viz., malice, did actually exist. If the prisoner had grown grey in iniquity, it might be argued that the malignant passions operated; but being young as he is, strong proof of his malignity should be required before you convict. Can you believe that the young man before you has the hellish disposition which would have led, while in the possession of his senses, to the commission of this crime? Such is the constitution of our natures, fashioned and made after the likeness and image of God and partaking of some of His attributes—that no man, however abandoned, aspires to

commit the least wicked action but from a hope to gain some profit; much less a crime so black and detestable, so horrid, that it would seem to be a complication of all guilt. Where is the evidence, that the accused has been from his infancy an object of dread and detestation—that his life has been a continued series of idleness, cruelty, vicious indulgence and violence—where, in the thousand kind attentions to the children, in the alacrity with which he performed every menial service and anticipated the wants of every member of the family—where, in the confidence and esteem he inspired, was the countenance beaming with rage, the fierce, bold and headstrong demeanor, that caused all around first to tremble, then to hate, and which would indicate a readiness, upon provocation, to fly, regardless of consequences, in the face of all laws, human and divine? Unless all these circumstances concurred and unless, in addition, there was some provocation, some motive, the commission of the deed would be too big for belief, especially upon a defenseless and amiable woman. For the arm, that might be possibly raised and more strongly nerved, when met and opposed by a resisting and provoking man, would fall powerless and harmless before the imploring look of a meek and inoffensive woman. Is the prisoner, then, a vampire in human shape, stalking about the earth, to drink the blood of our relatives and friends? Is he even a foreigner, educated in the school of vice, come to this country to rob and murder? Was it to glut savage vengeance, or satiate a long-settled and deadly hate? Was it a cool, calculating, money-making murder? Alas! her death has not only brought the most poignant grief, the bitterest anguish to the accused, but has put him in jeopardy of his life, and must at all events bring imprisonment, poverty and want.

But we shall prove to you that he was brought up and has always lived among people than which there lives not on earth a more uncorrupted, substantial population. He was educated in the school of honest industry, his only associates our farmers, who respect and esteem men for their virtue and integrity. Criminals, too, calculate with accuracy the general



chances of detection. Where, in this case, was the caution, the management to avoid suspicion and detection, the effort at concealment which always accompanies real guilt, the haste to be gone? You cannot plant your finger upon any part of his conduct after the act which was such as would be a rational man's under a sense of guilt, or apprehension of punishment; you cannot even conjecture a motive that can stand a moment's test; you cannot fix upon any indication before the act that borders upon design or malice: every circumstance in the whole history of the case, as given by the government witnesses, completely negatives any such belief. The conduct of the prisoner before and after the act, and the confidence reposed in him after the winter occurrence, by those who thoroughly knew and who were best able to judge, is confirmation strong of his innocence, for facts will not lie. Why, it shows in that case he was not only innocent, but above all suspicion; and if he was innocent then, he was the June following; but all we have to do is to raise a doubt and claim the merciful interposition of the law. And I ask you, gentlemen, even now to search your own bosoms and say if the Government has made out such a case as the law requires they should, before you can convict. But, gentlemen, laying aside the humane principle of the law, still you should lean against conviction, upon principles of philosophical responsibility, unless express malice is proven, where the defense set up is somnambulism or insanity. For, as a celebrated jurist observed, "the moral circumstances which precede or accompany crimes generally show whether they are the result of criminal intentions or derangement of intellect; that is to say, that in a real criminal there is always some motive of personal interest by which the moral cause of his act may be known." The form of insanity, too, which commonly leads to the perpetration of any enormity increases the difficulty of detecting it. And while there can be no danger of the guilty escaping from the mystery in which such subjects are involved, and indeed everything relating to the human mind, there is great danger of the innocent being punished. For it is not long since superstition

and ignorance imputed every remarkable deviation of the human mind to the influence of evil spirits, and believed as Proculus said, "that the devil actually got into a lunatic as a maggot gets into a filbert." People formerly had no idea of insanity, unless the individual was continually raving and stark mad, while in reality the degrees of derangement and the conduct of individuals when seized are so diversified and infinite that in the largest receptacle of lunatics no two individuals can be found in whom all these particulars are precisely similar. They are as various as are the intellects, features, the constitutions and temperaments of men. So, that were you, gentlemen, even acquainted with all the cases of insanity that ever have existed, you might not find one precisely parallel. And since the diseases of the mind are in their nature so obscure and so untoward in their manifestations, in order that all the indications should occur to you of insanity, which in fact do exist in this case, in order for you to trace fully the connection of all the concomitant circumstances in his bodily functions, in order for you to investigate fully the effects which would result from an attack under a particular, previous train of thought, and of a person of his temperament, you should have seen and studied insanity and somnambulism in their ten thousand different modifications of aspect. If, then, the maladies of the mind may be to us generally the most unknown of all diseases, we should be cautious, as I before remarked, purely on principles of philosophical responsibility, lest we add another victim to the thousands who, notwithstanding their insanity, and being as devoid of criminality as any of us, have been executed by Christian tribunals. For their blood, inasmuch as it lies not upon that noble system of jurisprudence, the common law, surely it cries aloud for all concerned in the administration of justice to be cautious, to beware, lest in their ardor to punish a homicide the dividing line between sanity and insanity be by them overleaped. But, gentlemen, if we may not be acquainted with those nice distinctions of the peculiar varieties of somnambulism and insanity, depending on diversities of temperament, habits, intel-

lectual abilities and the faculties principally affected—and all the immediate causes of these diseases, the knowledge of which would so much assist us in doing justice in this case, still we know that all the powers of the mind are as liable to be affected by disease and disease of various kinds, as those of the body; and either the mind or body may be attacked in the whole of their powers at once, or in a single power. We know that the virtuous and vicious, the idle and industrious, the weak and strong, the rich and poor, are all liable to be precipitated without a moment's warning into the gulch of madness. In that horrid state, as well as somnambulism, the mind may be indeed considered as a city without walls, open to every insult, and paying homage to every invader; every idea that then starts, however absurd, however criminal or foolish, however untrue, becomes a reality; and reason and judgment, being dethroned, can make no resistance against the tyrannical invasion. It may come on suddenly or by degrees; it may last for months, hours, or only a few minutes. Insanity is often intermittent, and has exacerbation and remissions. There are fevers and fits of the mind as well as fevers and fits of the body. And we have the very best authority for saying, that in a state of perfect waking, and at a time when the mind is most finely strung, the presence of superabundant acid in the stomach, dyspepsia however produced, may disturb its exquisite attunement and prostrate the reason. The valiant man, under this poor sympathy, will become for the time a coward, the philosopher a fool; the mild, furious, and the amiable, bloodthirsty and terrible. Wonderfully and fearfully indeed are we made and slender is the tenure by which all of us hold our moral and intellectual existence. Nothing may be more inexplicable, but nothing is more certain, than that in the twinkling of an eye "all our best principles may by disease, by insanity, be perverted, and a pious Christian changed into a drunkard and abandoned felon; that others naturally of a mild and pacific disposition appear, during their attacks, to be inspired by the very demon of mischief; some of a known prob-

ity, feel a blind propensity to steal; others feel a ferocious inclination to commit to the flames everything of a combustible nature, or to imbrue their hands in human blood; modest females are seized with the feelings of the loose libertine, wretched persons think themselves popes, lords, ministers, kings and emperors." It may be produced by impressions that act primarily upon the heart, such as joy, terror, love, fear, grief, loss of liberty, severe disappointments, a violent and long continued exertion of any of the passions or the dread of some real or imaginary evil. It may be produced by great bodily exertion, by labor or accident, or it may be inherited, be born and bred, as it were, in a person, and burst out without any known adequate cause.\*

Such, gentlemen, are some of the sudden and inexplicable appearances and durations of insanity and some of its woeful effects in all ages and countries from the days of Saul to the present time, although, like the human face, it assumes an infinite variety of shapes and forms.

In regard to somnambulism, which is allied to insanity, and frequently, as it were, runs into it, Abercrombie says:

The Somnambulist is, to a certain degree, susceptible of impressions from without, through his organs of sense; not, however, so as to correct his erroneous impressions, but rather to be mixed up with them.

The first degree of somnambulism generally shows itself by a propensity to talk during sleep; the person giving a full and connected account of what passes before him in dreams, and often revealing his own secrets or those of his friends. Walking during sleep is the next degree, and that from which the affection derives its name. The phenomenon connected with this form are familiar to every one. The individual gets out of bed; dresses himself; if not prevented, goes out of doors; walks frequently over dangerous places in safety; sometimes escapes by a window, and gets to the roof of a house; after a considerable interval, returns and goes to bed; and all that has passed conveys to his mind merely the impression of a dream. A young nobleman, mentioned by Horstius, living in the citadel of Breslau, was observed by his brother, who occupied the same room, to rise in his sleep, wrap himself in a cloak, and escape by a window to the

\* *Mr. Peaslee* read to the jury at length extracts from Hale's Pleas of the Crown, from Lord Erskine's speech on the trial of Hadfield, and from a number of medical authors of high repute.

roof of the building. He there tore in pieces a magpie's nest, wrapped the young bird in his cloak, returned to his apartment, and went to bed. In the morning he mentioned the circumstances as having occurred in a dream, and could not be persuaded that there had been anything more than a dream till he was shown the magpies in his cloak. Dr. Prichard mentions a man who rose in his sleep, dressed himself, saddled his horse, and rode to the place of a market which he was in the habit of attending once every week; and Martinet mentions a man who was accustomed to rise in his sleep and pursue his business as a saddler. There are many instances on record of persons composing during the state of *somnambulism*; as of boys rising in their sleep and finishing their tasks which they had left incomplete. A gentleman at one of the English universities had been very intent during the day in the composition of some verses which he had not been able to complete; during the following night he rose in his sleep and finished his composition; then expressed great exultation, and returned to bed.

In these common cases the affection occurs during ordinary sleep; but a condition very analogous is met with, coming on in the daytime in paroxysms, during which the person is affected in the same manner as in the state of *somnambulism*, particularly with an insensibility to external impressions; this presents some singular phenomena. These attacks in some cases come on without any warning; in others, they are preceded by a noise or sense of confusion in the head. The individuals then become more or less abstracted, and are either unconscious of any external impression, or very confused in their notions of external things. They are frequently able to talk in an intelligible and consistent manner, but always in reference to the impression which is present in their own minds. They in some cases repeat long pieces of poetry, often more correctly than they can do in their waking state, and not unfrequently things which they could not repeat in their state of health, or of which they were supposed to be entirely ignorant. In other cases, they hold conversation with imaginary beings, or relate circumstances or conversations which occurred at remote periods, and which they were supposed to have forgotten. Some have been known to sing in a style far superior to anything they could do in their waking state; and there are some well-authenticated instances of persons in this condition expressing themselves correctly in languages with which they were imperfectly acquainted. I had lately under my care a young lady who is liable to an affection of this kind, which comes on repeatedly during the day, and continues from ten minutes to an hour at a time. Without any warning, her body becomes motionless, her eyes open, fixed, and entirely insensible; and she becomes totally unconscious of any external impression. She has been frequently seized while playing the piano, and has continued to play over and over a part of a tune with perfect correctness, but without advancing beyond a certain point. On one occasion she was seized after she had begun to play from the book a piece of music which was new to her. During the paroxysms, she continued the part which she had

played, and repeated it five or six times with perfect correctness; but, on coming out of the attack, she could not play it without the book.

During the paroxysms the individuals are, in some instances, totally insensible to anything that is said to them; but in others they are capable of holding conversation with another person with a tolerable degree of consistency, though they are influenced to a certain degree by their mental visions, and are very confused in their notions of external things. In many cases, again, they are capable of going on with the manual occupations in which they had been engaged before the attack. This occurred remarkably in a watchmaker's apprentice mentioned in Martinet. The paroxysms in him appeared once in fourteen days, and commenced with a feeling of heat extending from the epigastrium to the head. This was followed by confusion of thought, and this by complete insensibility; his eyes were open, but fixed and vacant, and he was totally insensible to anything that was said to him or to any external impression. But he continued his usual employment, and was always much astonished, on his recovery, to find the change that had taken place in his work since the commencement of the paroxysm. The case afterward passed into epilepsy.

Two females, mentioned by Bertrand, expressed themselves during the paroxysm very distinctly in Latin. They afterward admitted that they had some acquaintance with the language, though it was imperfect. An ignorant servant-girl, mentioned by Dr. Dewar, during paroxysms of this kind, showed an astonishing knowledge of geography and astronomy; and expressed herself in her own language in a manner which, though often ludicrous, showed an understanding of the subject. The alternations of the seasons, for example, she explained by saying that the earth was set *a-gee*. It was afterward discovered that her notions on these subjects had been derived from overhearing a tutor giving instructions to the young people of the family. A woman who was some time ago in the Infirmary of Edinburg, on account of an affection of this kind, during the paroxysms mimicked the manner of the physicians, and repeated correctly some of their prescriptions in the Latin language.

Another very singular phenomenon, presented by some instances of this affection, is what has been called, rather incorrectly, a state of double consciousness. It consists in the individual recollecting during a paroxysm, circumstances which occurred in a former attack, though there was no remembrance of them during the interval. This, as well as various other phenomena connected with the affection, is strikingly illustrated in a case described by Dr. Dyce of Aberdeen, in the Edinburg Philosophical Transactions. This patient was a servant-girl, and the affection began with fits of somnolency, which came upon her suddenly during the day, and from which she could, at first, be roused by shaking her, or by being taken out into the open air. She soon began to talk a great deal during the attacks, regarding things which seemed to be passing before her as a dream; and she was not at this time sensible of anything that



was said to her. On one occasion she repeated distinctly the baptismal service of the Church of England and concluded with an extemporary prayer. In her subsequent paroxysms she began to understand what was said to her, and to answer with a considerable degree of consistency, though the answers were generally to a certain degree influenced by her hallucinations. She also became capable of following her usual employments during the paroxysm; at one time she laid out the table correctly for breakfast, and repeatedly dressed herself and the children of the family, her eyes remaining shut the whole time. The remarkable circumstance was now discovered that during the paroxysm she had a distinct recollection of what took place in former paroxysms, though she had no remembrance of it during the intervals. At one time she was taken to church while under the attack, and there behaved with propriety, evidently attending to the preacher; and she was at one time so much affected as to shed tears. In the interval she had no recollection of having been at church; but in the next paroxysm she gave a most distinct account of the sermon, and mentioned particularly the part of it by which she had been so much affected.

The paroxysms generally continued about an hour, but she could often be roused out of them; she then yawned and stretched herself, like a person awaking out of sleep, and instantly knew those about her. At one time, during the attack, she read distinctly a portion of a book which was presented to her; and she then sang both sacred and common pieces, incomparably better, Dr. Dyce affirms, than she could do in the waking state.—*Abercrombie on Intellectual Powers, page 237, et Seq.*

Somnambulism appears to be a morbid modification of ordinary dreaming. It is, in fact, a dream so modified that the dreamer gains the power of pursuing, by voluntary motion, the objects which he is desirous of seeking, or avoiding in his reverie. "When we consider the near relation of somnambulism to the state of sleep, and to dreaming, it appears the more remarkable, that it should attack persons during their waking hours."

Several cases are on record, and some have occurred in my own practice, in which a person, in his waking hours, has been suddenly seized with a fit of insensibility to external impressions, during which his condition, in every respect, resembled that of the sleep-walker.

These fits suddenly terminate when the person is awakened, and generally recollects little or nothing of what has passed.—*Prichard on Diseases of the Nervous System, page 401, et seq.*

Somnambulism bears a closer analogy than a common dream to madness—"Like madness, it is accompanied with muscular action, with coherent and incoherent conduct, and with that complete oblivion (in most cases) of both, which takes places in the worst grade of madness."

A young man named John, who works at Cardrew, near Redruth, being asleep in the sump-house of that mine, was observed by two boys to rise and walk to the door, against which he leaned; shortly after, quitting that position, he walked to the engine-shaft, and



safely descended to the depth of twenty fathoms, where he was found by his comrades soon after, with his back resting on the ladder. They called to him, to apprise him of the perilous situation in which he was, but he did not hear them, and they were obliged to shake him roughly till he awoke, when he appeared totally at a loss to account for his being so situated.

In Lodge's "Historical Portraits," there is a likeness, by Sir Peter Lely, of Lord Culpepper's brother, so famous as a dreamer. In 1686, he was indicted at the Old Bailey, for shooting one of the Guards, and his horse to boot. He pleaded somnambulism, and was acquitted on producing nearly fifty witnesses to prove the extraordinary things he did in his sleep.

A very curious circumstance is related of Dr. Franklin, in the memoirs of that eminent philosopher, published by his grandson. "I went out," said the Doctor, "to bathe in Martin's salt water hot bath, in Southampton, floating on my back, fell asleep, and slept nearly an hour, by my watch, without sinking or turning—a thing I never did before, and could hardly have thought possible."

A case still more extraordinary occurred some time ago in one of the towns on the coast of Ireland. About two o'clock in the morning, the watchmen on the Revenue quay, were much surprised at descrying a man disporting himself in the water, about a hundred yards from the shore. Intimation having been given to the Revenue boat's crew, they pushed off and succeeded in picking him up, but, strange to say, he had no idea whatever of his perilous situation; and it was with the utmost difficulty they could persuade him he was not still in bed. But the most singular part of this novel adventure, and which was afterwards ascertained, was that the man had left his house at twelve o'clock that night, and walked through a difficult, and, to him, dangerous road, a distance of nearly two miles, and had actually swum one mile and a half when he was fortunately discovered and picked up.

Not very long ago a boy was seen fishing off Brest, up to the middle in water. On coming up to him, he was found to be fast asleep.

I know a gentleman who, in consequence of dreaming that the house was broken into by thieves, got out of bed, dropped from the window (fortunately a low one) into the street; and was a considerable distance on his way to warn the police, when he was discovered by one of them, who awoke him, and conducted him home.

A case is related of an English clergyman who used to get up in the night, light his candle, write sermons, correct them with interlineations and retire to bed again, being all the time asleep. The Archbishop of Bourdeaux mentions a similar case of a student, who got up to compose a sermon while asleep, wrote it correctly, read it over from one end to the other, at least appeared to read it, made corrections on it, scratched out lines, and substituted others, put in its place a word which had been omitted, composed music, wrote it accurately down, and performed other things equally surprising. Dr. Gall takes notice of a miller who was in the habit of getting up every night and attending to his usual avocations at the mill, then return-

ing to bed; on awaking in the morning, he recollected nothing of what passed during the night. Dr. Blacklock, on one occasion, rose from bed, to which he had retired at an early hour, came into the room where his family were assembled, conversed with them, and afterwards entertained them with a pleasant song, without any of them suspecting he was asleep, and without his retaining after he awoke, the least recollection of what he had done. It is a singular, yet well authenticated fact, that in the disastrous retreat of Sir John Moore, many of the soldiers fell asleep, yet continued to march along with their comrades.

The stories related of sleep walkers are, indeed, of so extraordinary a kind, that they would almost seem fictitious, were they not supported by the most incontrovertible evidence. To walk on the house-top, to scale precipices, and descend to the bottom of frightful ravines, are common exploits with the somnambulist; and he performs them with a facility far beyond the power of any man who is completely awake. A story is told of a boy who dreamed that he got out of bed and ascended to the summit of an enormous rock, where he found an eagle's nest, which he brought away with him, and placed beneath his bed. Now, the whole of these events actually took place; and what he conceived, on awaking, to be a mere vision, was proved to have had an actual existence, by the nest being found in the precise spot where he imagined he had put it, and by the evidence of spectators who beheld his perilous adventure. The precipice which he ascended was of a nature that must have baffled the most expert mountaineer, and such as at other times he never could have scaled.

Dr. Gall relates that he saw at Berlin a young man, sixteen years of age, who had, from time to time, very extraordinary fits. He moved about unconsciously in bed, and had no perception of anything that was done to him; at last he would jump out of bed and walk with rapid steps about the room, his eyes being fixed and open. Several obstacles which were placed by Dr. Gall in his way, he either removed or cautiously avoided. He then threw himself suddenly again upon bed, moved about for some time, and finished by jumping up awake, not a little surprised at the number of curious people about him.

The facility with which somnambulists are awakened from the paroxysm, differs extremely in different cases. One man is aroused by being gently touched or called up, by a flash of light, by stumbling in his peregrinations, or by setting his foot in water. Another remains so heavily asleep that it is necessary to shout loudly, to shake him with violence, and make use of other excitations equally powerful.

The remote causes of sleep-walking are so obscure that it is seldom we are able to ascertain them. General irritability of frame, a nervous temperament, and bad digestion, will dispose to the affection. Being a modification of dreaming, those who are much troubled with the latter will, consequently, be most prone to its attacks. The causes, however, are, in a great majority of cases, so completely unknown

that any attempt to investigate them would be fruitless; and we are compelled to refer the complaint to some idiosyncrasy of constitution beyond the reach of human knowledge.

Persons have been known, for instance, who delivered sermons and prayers during sleep; among others, Dr. Haycock, Professor of Medicine in Oxford. He would give out a text in his sleep, and deliver a good sermon upon it; nor could all the pinching and pulling of his friends prevent him. "One of the most remarkable cases of speaking during sleep," observes a writer in *Frazer's Magazine*, "is that of an American lady, now (we believe) alive, who preached during her sleep, performing regularly every part of the Presbyterian service, from the psalm to the blessing. We know individuals who have heard her preach during the night in the steamboats; and it was customary, at tea parties in New York (in the houses of medical practitioners), to put the lady to bed in a room adjacent to the drawing room, in order that the dilettanti might witness so extraordinary a phenomenon.

"A remarkable instance of this affection occurred to a lad named George David, sixteen years and a half old, in the service of Mr. Hewson, butcher, of Bridge-Road, Lambeth. At about twenty minutes after nine o'clock, the lad bent forward in his chair, and rested his forehead on his hands, and in ten minutes started up, went for his whip, put on his own spur, and went thence to the stable; not finding his own saddle in the proper place, he returned to the house and asked for it.—Being asked what he wanted with it, he replied, to go his rounds. He returned to the stable, got on the horse without the saddle, and was proceeding to leave the stable; it was with much difficulty and force that Mr. Hewson, junior, assisted by the other lad, could remove him from the horse; his strength was great, and it was with difficulty he was brought in doors. Mr. Hewson, senior, coming home at this time, sent for Mr. Benjamin Ridge, an eminent practitioner, in Bridge-Road, who stood by him for a quarter of an hour, during which time the lad considered himself as stopped at the turnpike-gate, and took sixpence out of his pocket to be changed; and holding out his hand for the change, the sixpence was returned to him. He immediately observed, 'None of your nonsense—that is the sixpence again; give me my change;' when two-pence halfpenny was given to him, he counted it over, and said, 'None of your gammon; that is not right; I want a penny more;' making the three pence halfpenny, which was his proper change. He then said, 'Give me my castor (meaning his hat), which slang term he had been in the habit of using, and then began to whip and spur to get his horse on. His pulse at this time was 136, full and hard; no change of countenance could be observed, nor any spasmodic affection of the muscles, the eyes remaining closed the whole of the time. His coat was taken off his arm, shirt-sleeves tucked up, and Mr. Ridge bled him to 32 ounces; no alteration had taken place in him during the first part of the time the blood was flowing; at about 24 ounces, the pulse began to decrease; and when the full quantity named above had been taken, it was at 80—a slight perspi-

ration on the forehead. During the time of bleeding, Mr. Hewson related a circumstance of a Mr. Harris, optician, in Holborn, whose son, some years since, walked out on the parapet of the house in his sleep. The boy joined the conversation, and observed, 'He lived at the corner of Brownlow-Street.' After the arm was tied up, he unlaced one boot, and said he would go to bed; in three minutes from this time, he awoke, got up, and asked what was the matter (having then been one hour in the trance), not having the slightest recollection of anything that had passed, and wondered at his arm being tied up, and at the blood, &c. A strong aperient medicine was then administered; he went to bed, slept well, and the next day appeared perfectly well, excepting debility from the bleeding, and operation of the medicine, and has no recollection whatever of what had taken place. None of his family or himself were ever affected in this way before."—*Philosophy of Sleep*, page 148, *et seq.*

Many more cases of temporary insanity, or somnambulism, might be adduced. The case of Mr. Little, of New York, who rose in his sleep, gained the roof of his house, three stories high, and walked off the gable-end. The case of a young girl, ten years of age, who was discovered early in the morning, walking on the top of one of the loftiest houses in the city of Dresden, apparently occupied in preparing some ornaments, as a Christmas present. She continued her terrific promenade for hours; sometimes sitting on the parapet, and dressing her hair; at others, gazing towards the moon, and singing or talking to herself. Once she approached the very verge of the parapet, leaned forward, looked upon the nets suspended from the balcony of the first floor, the thickly strewn straw, in the street beneath, and the multitude expecting her fall; she rose up, however, and returned carelessly to the window, by which she had got out; when she saw there were lights in the room, she uttered a piercing shriek, which was re-echoed by thousands below, and fell dead into the street. The case of a Carthusian monk, who, while awake, was remarkable for his simplicity, probity and candor, but, unfortunately, almost every night walked in his sleep, and like the fabled Penelope, undid all the good actions for which he was celebrated by day; for upon such occasions, he was a thief, a robber, and a plunderer of the dead. The astonishing case of Jane C. Rider, at Springfield, of which you have all

heard, who, in her paroxysms, not only talked with more fluency and vivacity than usual, but in several instances got up and set the table with as much regularity as she did when awake, selecting the right articles, placing them upon the table, exactly as they should be, and moved about the house with as much ease and regularity as usual, although her eyes were often half shut. There were instances, too, as attested by many respectable witnesses, of her reading, with her eyes shut and bandaged! These paroxysms not only came on in the night, but frequently during the day, and when wide awake, and though, at such times, she skillfully played at backgammon, attended to needlework, and at one time took an emetic (which, though it relieved her headache, did not awaken her), yet she recollected nothing afterwards of what transpired. The case of a student of medicine, who was accustomed to talk and answer questions in his sleep—some of his friends, at one time, mentioned the name of his mistress; he at first talked incoherently, but soon his dreams related to the subject of his affections—thought he was under her window, and upbraided her for not appearing; at length, becoming impatient, he started up in his sleep, and threw whatever he could lay hold of against the opposite side of the wall of his chamber, evidently supposing it was the window of his mistress' room; when told the next day of what had happened he said he had only a faint recollection of having dreamed of his mistress. The case of a person, whose friends could make him dream what they pleased, and at one time carried him through the whole process of a duel; at last, putting a pistol into his hand, he actually fired it off, and was awakened by the report. The case of a pious clergyman, who would frequently rise in the night, steal and secrete everything he could lay hold off, and in one instance robbed his church. Of a student at college, who, at different times, secreted under the eaves of the college building the money his father sent him, and supposed it to have been stolen, until he was discovered concealing it, where the rest was found. Of two individuals who, being caught out over night, in a place infested

with robbers, one watched while the other slept, but, falling asleep, and dreaming of being pursued, shot his friend through the heart. But cases enough have been cited, to show you, that although the mind, at such times, possesses power over the limbs, it has no influence over its own thoughts. A thousand strange phantoms come and go, without the will, or any consciousness, and these take firm possession of the mind, leading the unfortunate victim of somnambulism, or insanity to the commission of acts the most shocking, revolting and unaccountable to him in his waking moments.

You will perceive, Gentlemen, that there is an endless variety of wild and inconsistent conduct in insane and somnambulating individuals, and that these diseases are confined to no rules or limits, either in the duration or mode of attack. These may be inexplicable phenomena, and the case now under consideration may appear to you mysterious. Well, if any one should undertake to explain why any of the cases cited, so happen, it would be only undertaking to explain a very great obscurity, by being somewhat more obscure; it is sufficient for us to know they are facts, and corresponding with the one now on trial and the Government having, it is believed, completely failed to prove the felonious intent, every idea of malice being in fact negatived by their own witnesses—every act of the prisoner, before, at the time, and after the homicide, being contrary to any known conduct of a sane man (either before or since the flood), who had intended such a crime—all the probabilities, surely are in favor of the prisoner's innocence, and the case falls short, far short, of being made out as the law requires, beyond a reasonable doubt.

But, Gentlemen, though we think that if we stopped here, you would say that it was more probable he was insane than sane and heretofore could not, with your oaths upon you, convict; yet as we shall produce testimony in behalf of the prisoner (for counsel, in a capital trial, ought not to omit anything they may deem material), and it will be such as should remove every suspicion of guilt, every prejudice should be



dissipated, every heart should acquit, and no man should hereafter regard the unfortunate youth before you but with feelings of sympathy and compassion. We shall prove that the grandparents, sister and cousin of the prisoner were subject to sudden attacks of insanity, which lasted for a short time and went off, and that these diseases, as well as numerous others, are transmissible from one generation to another.

"It is of little real importance," says Burrows, "whether it be a predisposition, or the malady itself, which descends and becomes hereditary; but no fact is more incontrovertibly established than that insanity is susceptible of being propagated; or, in other words, that a specific morbid condition sometimes exists in the human constitution, which by intermarriage, or according to the vulgar but expressive language of the cattle breeders, by *breeding in and in*, may be perpetuated *ad infinitum*."

"Hereditary predisposition, therefore, is a prominent cause of mental derangement."

"Mania and melancholia do not propagate their respective types; a maniac may beget a melancholic, and *vice versa*."

Esquirol assigns one hundred and fifty out of two hundred and sixty-four cases in his own practice, to *heredity*.

Dr. Burrows says he "has clearly ascertained that an hereditary predisposition existed in six-sevenths of the whole of his patients."

This predisposition often lies dormant in one generation and manifests itself in the next. We shall prove to you that there was a very early and large development of the brain, an unnatural growth of the prisoner's head, so much so, that at two years old, it was as large as at the present time; that it was then diseased, attended with much pain—that there were evident symptoms of insanity, and actual somnambulism then; and that the physician, who attended him, said, "he would be likely hereafter to be insane."

Here, then the jury will observe there are four distinct proofs, viz: the insanity of his grand parents, secondly of his collaterals, thirdly the singular formation of his head and in addition, actual early somnambulism; all and each of which show that there must be a peculiar organization of the prisoner's nerves, brain and blood vessels, on which a predisposition to insanity or somnambulism depends, rendering him more liable to these diseases than others, and consequently they



would be excited in him by more feeble causes. Excited by more feeble causes did I say, they are each of themselves causes, and no additional bodily disease, no moral cause was necessary, to occasion a breaking out, a manifestation of that which from his birth was pent up within him. The wonder is, that the equilibrium was preserved so long, not that insanity did not manifest itself sooner, and it is to be accounted for on the ground, that very young and very old persons are not so liable to be attacked, as persons in middle life, and that he was placed in the most favorable circumstances to repress it; for it is already in evidence before you, that he had always lived in perfect harmony, confidence and esteem with every member of the family. It was his regular food, pursuits and employments, his freeness from all care and anxiety, his otherwise robust constitution and good health, the kind treatment he received and deserved; these were the circumstances, which protected that easily disordered string, the human mind, in all, but particularly in him, so long from being untuned.

He had arrived at the time of the fatal occurrence, to that period of life, when the mind was becoming more energetic, when it possessed more sensibility, consequently was more easily acted upon by mental irritants, when the vivid affections were most operative, when whatever the imagination took hold of, it seized with force, and in a person like him, constantly on the poise between sanity and insanity, would be likely to usurp dominion over the reason and judgment and throw him into that unfortunate state, which he inherited from his ancestors and to which he in some measure had been accustomed in his infancy. Do you inquire, Gentlemen, what was that mental irritant, that excitement of the imagination, which helped to throw him off his balance? Why, it was the Avery trial,<sup>b</sup> which Cochran was reading at the time they left the house. A subject, which so intensely, at that period, engaged the thoughts of the whole community, but at that particular time of every member of this family, and concerning

<sup>b</sup> See 10 Am. St. Tr.

which, very probably, he and Mrs. Cochran conversed, as they passed along. It was the excitable and astounding thought to all, but particularly to him, that a minister of a holy religion should have been on trial for so monstrous a crime; that sacerdotal robes should appear to some, to be stained with a murderer's blood—it was, that one of that denomination with which he had probably worshipped, and whom he looked upon, from his sacred calling, as standing at the very gates of heaven, should be suspected of such hellish hypocrisy—it was this agitating thought, that helped unman his diseased intellect and led him without consciousness, whither it would,—and the effect was precisely such, as would be likely to result from such causes, and with such immediate previous mental associations. We all know, that the subject of our recent thoughts are often the subject of our dreams, and so it is in somnambulism and insanity; well, acts of violence, killing a female, having got firm possession of his diseased intellect (by means of the Avery trial), and in fact aiding or causing a manifestation of insanity, the act was such as medical men would have foretold, for similar cases are recorded.

“M. Barbier, a physician of Amiens, in a late sitting of the Academy of Medicine at Paris, related the case of a woman, 24 years of age, who, having lost a child 3 months old, became the mother of a second. Ever since the trial of Mad. Cornier, this woman has been tormented with the dreadful propensity to destroy this second infant. The propensity was at first feeble, but gradually augmented, and about 15 days previous to the date of report, the sight of a knife rendered this propensity so irresistible that the unhappy mother was forced to cry out for assistance, lest she should embrue her hands in the blood of her child. M. Barbier had this woman admitted into the hospital at Amiens, in order to narrowly watch the case. In respect to her moral faculties, there was nothing extraordinary except this unhappy propensity. Her intellectual faculties were perfectly sane.

“The above case excited the narration of several others by the members present. M. Marc lately saw a female, 32 years of age, the mother of several children, who had an irresistible desire to destroy her offspring.

“M. Bricheteau stated the case of a young woman, of amiable disposition, the mother of two children whom she had nursed, who, having gone to Vincennes for the purpose of spending a few weeks

of the summer, was shown the spot where Papavione executed her criminal act. The sight of this spot made such an impression on her imagination that she has, ever since, been harrassed with the horrible propensity to murder her mother and one of her children! Happily, she disclosed the dreadful wish that lurked in her breast—she was removed from the place and narrowly watched. By degrees the murderous desire subsided; but it was some time before she could bear the sight of her mother.

“M. Esquirol stated that, since the trial of Madame Cornier, he has become acquainted with six instances of a parallel nature. Among these was a Protestant minister, who became affected with the desire of destroying a favorite child. He struggled against this terrible inclination for 15 days, but was at last driven to the attempt on his child’s life, in which he fortunately failed.

“Vilmerme related the case of a woman, who, immediately after hearing the account of an assassination, was tormented, for three nights, with the desire to destroy her daughter, a girl 7 years of age. She had even secreted a weapon for the execution of her horrible purpose!

“M. Costel observed that all these facts, singular as they might appear, were explicable by a change in the sensibility—in short, on the principle of morbid sensibility. In this condition, example has a most powerful influence. In illustration of this he mentioned the remarkable fact that, at the Hotel des Invalides, a soldier having hanged himself on a post, his example was followed, in a very short time, by twelve other invalids—and that by removing this fatal post, the suicidal epidemic was put an end to.

“M. Marc, in conclusion, descanted on the bad effects of giving publicity to the acts of suicide, infanticide and homicide, now daily and hourly meeting the eyes of people in a nervous or melancholic condition, and leading to a multiplication of those acts themselves.

“We have no doubt that this is one cause of the more frequent occurrence of these catastrophies now than formerly.”—*Medical Chi. Rev.*, Vol. 10, page 226, *et seq.*

Do you inquire, why he did not instinctively shrink from injury to her whom he regarded as more than mother? Why every one knows, and the cases read show, that insane persons are most liable to do acts of violence to those, for whom in their lucid intervals, they have the most esteem. In addition, we expect to prove there were adequate, operating, physical causes, which, in conjunction with these moral causes, occasioned the manifestation of his disease at the time. Farmers, too, it is said, are more liable to be deranged than any other class of people of the same grade of intellect, and this is owing to the greater solitude of their lives, especially in the win-

ter season, and to their being more exposed from labor and accident to its corporeal causes.

One of these occurrences happened in the winter, the other immediately after great bodily effort. And happening at different times and without any known or suspected malice, at either, the probability of insanity is much strengthened. We have read to you that persons predisposed to insanity are more liable to have a paroxysm about the summer equinox, about the time this happened. But, Gentlemen, do you demand in addition to this train of circumstances, mutually supporting each other, and all leading to the same conclusion, some index, some decisive foreign proof: something standing aloof from everything else, and standing on the front of the whole transaction—these letters, “he is insane.” Why, as it often happens, that the most guarded and secret criminals are detected by the most trifling circumstance; so it seems almost providential in this instance that proof of an independent matter, should have been produced on the part of the government, making his innocence still more clear.

It has been proved to you that he was, at the time, violently seized with the toothache, so much so, that he was obliged to sit down. We shall prove to you that this affection is nervous, and caused by the state of the stomach, and that so is somnambulism and insanity. This, then, is a most important and conclusive fact, taken in connection with his insensibility, his insanity; to show that an adequate physical cause existed at the time to produce insanity, unless you believe the prisoner to have feigned it, knowing its connection, which is the most unlikely of any thing that can be possibly imagined.

Thus, Gentlemen, shall we prove by books and medical men, every circumstance in the case, to bear the impress of somnambulism or insanity, and no more could be done in any instance.

Lastly, we refer you to the act itself, as evidence strong of its being the act of a maniac, towards one, for whom he never entertained any unkind sentiment, or unfriendly feeling. The verdict of innocence has been pronounced on the winter

transaction by those best able to judge; who were thoroughly acquainted with his motives, his feelings and his character, and if he was innocent then, he must have been the June following.

#### THE WITNESSES FOR THE PRISONER.

*Hezekiah Blake.* Live in Kensington, about a mile and a half from the residence of old Abraham Prescott, grandfather of the prisoner. He died 45 years ago. Knew him well. He was crazy at times, and difficult in his family—acted strange, and would disregard his wife. It was a common remark that it was strange any man should spite his best friends as he did. He had several spells—but do not know how long they lasted. He was a very clever man—a religious man. Knew Marston Prescott, a nephew of the old man—lived in the neighborhood. He was crazy a number of times to my knowledge. He never offered any abuse to anybody, but would go about from house to house, making all sorts of fun, and would sometimes use very bad and wicked language. Knew him about 30 years, during which time he had several of these spells of being out or crazy, as folks called it. Left Kensington before his death. Also know Moses Prescott, son of Marston. He is not in his right mind, but not so crazy as his father. He is under guardianship. Saw him a few days ago—he has been down three summers running to Kensington. He can work some, but still is not right.

*Cross-examined.* Don't know from my own knowledge that old Abraham Prescott was deranged—never saw him deranged, and know it only by what other

folks said. Knew Marston's situation—saw him often in his spells—he would travel this way and that continually—didn't talk like a rational man—would run on and talk all manner of fun, and bad words. He offered no abuse to any one—If he hadn't been crazy would not have run about so. He used to work for me—when first married he used to attend to business. Had these spells afterwards, once or twice a year—would last a month or so, when he would come out of them and go to work. Was not in a situation to do business while in these spells—nobody traded with him—I shouldn't have thought of trading with him. He generally wanted cider, and would get it as he walked about—the more he got, the more crazy he grew. I do not think cider the whole cause of his spells—he was regular enough at times—but people said he was intemperate, and drink always made him worse.

*Mrs. Mary Poor.* Was born in Kensington and lived there until I was 27 years old. Was about 15 or 16 when old Abraham Prescott died. Saw him sometimes before his death, at his daughter's, opposite my father's. Friends then called him an insane person. He was sometimes very talkative and lively, at others more sad and mute; heard folks say he dwelt very much on religious subjects. Knew Marston Prescott; he was called a de-

ranged man; saw him several times at my father's when he looked as if he had been out all night; his clothes were wet and dirty; he moved to Deerfield about a dozen years ago; was once or twice so afterwards. Have seen his son Moses lately, walking about from one place to another; he was not half so insane as his father.

*Cross-examined.* Last time I saw Abraham Prescott I was about fifteen years old; can't say I ever saw him more talkative at one time than another; have no recollection of any other evidence of his being crazy than that folks said he was talkative and unsteady at times. Marston was a wanderer; was intemperate, and was in the habit of going from house to house and begging cider.

*Abraham Prescott, Jr.* A brother of mine, Benjamin Prescott, was subject to hypochondriac affection for a number of years, which entirely disqualified him for business. He would sometimes appear almost destitute of reason; refused to take food for fear he should die in the act; labored under the belief that he did not breathe; would often run across the room to the looking-glass, and sometimes keep his hand to his mouth nearly all day, to be sure that he actually breathed. He once secreted himself in the woods, and was afterwards confined. His delusion seemed to be confined to the idea of having lost his power of breathing. Suppose he was a cousin of the prisoner.

*Mrs. Hannah Huntoon.* Worked with Mrs. Blake, of Candia, aunt to prisoner, forty years ago. She appeared dull and melancholy;

everything went wrong with her; she said she was of no use, could not plan her work, and wished she might die. She seemed discontented with everything; folks said she was crazy. Her husband told me not to mind anything about it, as she was occasionally a little out.

*Cross-examined.* Husband and wife lived well enough together, as far as I knew. She was not jealous of him at that time, nor before, I believe. After I left, heard she was jealous of him. She appeared so different while I was there from what she formerly was that I thought she was crazy; don't know that she was particularly passionate; heard folks say her craziness was caused by violent passions; cannot tell if that was the cause; don't remember I ever told anybody it was; guess she was rather a high-tempered woman, but heard no complaint from her of her husband while I was there.

*Mrs. Mary Rowe.* Knew Mrs. Blake, sister of Chase Prescott, of Candia, and lived with her two-thirds of the time for twelve years. She appeared very dull; did not enjoy her business, and said she could not have anything done aright, it was of no use for her to work. When she was in these spells we used to try to divert her mind by taking her into company. The spells lasted sometimes three months. When well, she was cheerful and lively, and her conduct was altogether different.

*Cross-examined.* It is about thirty-three years since I lived with Mrs. Blake; no particular trouble between her and her husband while I lived there.



Her husband sometimes censured her for finding so much fault with her help. She was not so pleasant a woman with her husband as some are; don't know why; perhaps she thought he went from home too much. Her turns were not during a state of pregnancy. She used to accuse him of going after other women, but I don't think that was the cause of her being crazy. Knew old Abraham Prescott, of Kensington, from the time I was seven till I was fourteen years old. He appeared very odd at times; was very talkative, and at times much excited; people called him crazy. Knew Marston Prescott, and have seen him often when he appeared crazy. His son Moses, I have seen when he talked and acted like a crazy man. I understand he is under guardianship. Mrs. Blake once told me she had thought of drowning herself, and had frequently been tempted to do so; was twelve years old when I first lived at Blake's. Mr. Blake was my brother. Always knew old Abraham Prescott till his death, which happened when I was about fourteen; reason of thinking him crazy was his getting up of nights; folks said he got up; did not know it, but thought he looked and acted very odd.

*Mrs. Mary Prescott.* Am the mother of the prisoner, and am now seventy-four years old. He is my youngest child. When an infant, six weeks old, he began to falter, and his head to increase in size; sores broke in his head; the doctors recommended showering. Dr. Graves called and said he did not know as any help could be given. He left some medicine, and it did relieve him some. The doctor said from the appearance

of the child's head he should think he might be crazy in after life; he had known such instances. My son had a bad humor, which broke out in blisters on his feet and legs; we carried him to the sea when about two years old, but the salt water did him no good. He used to have dreadful spells of crying, when I could scarcely hold him. These spells lasted sometimes half the night. I was poor, and did the best I could to keep him dry and warm. When he grew older he used to get up in his sleep, and many a time I have had to watch him for fear he would stray away. He always acted different from other children. I don't think he ever had his senses as other children. Mrs. Blake once came to our house deranged; she had a little girl with her; she staid all night and was next day carried home to Candia; don't know that she ever had any difficulty with her husband. Mrs. Hodgdon, a half-sister of the prisoner, was always deranged when sick; was once taken suddenly ill at our house; physician was sent for; she was out two or three days, and was carried home. Refused to ride with her husband in returning or to nurse her child; took several to hold her; she used medicine at Raymond for the disorder in her head, and grew better.

*Cross-examined.* About thirty years ago Mrs. Blake came to our house out of her senses; she ran away; didn't appear to know anything; didn't talk rationally. She did nothing particular deserving the want of reason while there, and don't remember she said anything that made me think so; but she kept walking back and forth in the room, and



appeared to have no sense; woman of good sense when she was herself; not very talkative; can't say what she said; did not know where she was going.

*Chase Prescott.* Am the prisoner's father. Was about twenty-two when I left my father's. I worked out when between eighteen and twenty-two. My father was occasionally deranged, as I call it; don't know what you call derangement here. He had several spells, and there are many alive of my age who know it. I once got him out to cut stalks to try to divert him; he did not cut well, but would as often cut them off in the middle as any way, till he could get over his spells and become a little regular. Have often known my son, the prisoner, to get up in his sleep; my wife a great many times got out of bed to take care of him. His head was diseased, and he appeared crazy when quite small. He had terrible fits of screaming. At three years old his head was nearly as large as mine. I know it because we used to try on hats. Dr. Graves said he would put something on his head to stop its growing until his body came up. We used to shower him with cold water three mornings, and then miss three, and when we put the water on he would look scared and wild. We dipped him in the sea, but it didn't do good. Mrs. Hodgdon was my first wife's daughter and half-sister to the prisoner. If anything ailed her she was always out of her head. At such times she would strike her children. She was once at our house

with her child; staid two or three days; would not ride home in the sleigh with her husband or child, and I had to send down my daughter Betsey to carry the child. Mrs. Blake is my sister, and came to my house one summer deranged, as related by my wife. Used to now Marston Prescott. He was crazy a number of years; was steady at first; a very clever man; had a woman bad enough for anybody. Benjamin Prescott was crazy or hypochondriacal; distressed about his breathing; had to be shut up and was a part of the time chained; fit for nothing for a number of years.

*Cross-examined.* My father was always deranged at intervals while I lived at home. I was about twenty-eight when he died. He had these spells once in a year or two, and they would last some time; he could easily be put out, and kept traveling about the neighborhood.

*Dr. William Graves.* The statement of Mrs. Prescott is, in part, confirmed by my books. By them it appears that I prescribed for her child several times about eighteen years since. Have several charges for medicine and advice for a boy of Chase Prescott, but whether it was for the prisoner at the bar, or one of his brothers, have no means of knowing. I have nothing except my entries to refer to for information, and these I have copied. *Dr. Graves* read, by permission of the COURT, a copy of his original entries, which showed the following charges against Chase Prescott, viz.:

March 15, 1816. Medicine and advice for son.

April 16. Visit and medicine by Dr. Merrill, a pupil, for child.

August 29. Call at Widow French's, and advice for son.

October 15. Medicine sent by Dr. Goodhue to child.

October 19. Visit and medicine for child and grandchild.

These are the only charges I have against Mr. Prescott for medical attendance on his son or child. The other charges herewith exhibited were for professional services rendered to other members of his family; have no recollection of any unusual enlargement of the child's head; neither have I any recollection of making such remarks respecting the disease of the child as have been stated by his parents; neither can I persuade myself to believe that the disease was of that serious character which has been described. Knowing as I do, my uniform method of close attention to important cases, it appears to me that if I had considered the case so alarming and interesting as has been stated, that my visits would have been more numerous and not so far from each other.

*Mr. Bartlett.* Would not that depend, doctor, a little upon the ability of the party to pay?

*Mr. Sullivan.* This I protest against as a reflection upon the humanity of the witness.

*Dr. Graves.* I never measured the extent of my professional services by the ability of my patients. I resided in Deerfield nearly nineteen years, in the neighborhood of Mrs. Blake, during which time I was her family physician. Eight years since I moved to Lowell. Soon after the death of Mr. Blake, Mrs. Blake took up her residence in the same village. Was there her physician until her death. I never saw her deranged, and never heard it intimated until to-

day upon this stand. Do not know Marston Prescott; was well acquainted with Moses Prescott. He resided in my neighborhood at Deerfield; have known him twenty-seven years. He was given to intoxication, and at such times, and no other, was extremely troublesome to his family and neighbors.

*Mr. Bartlett.* Was Moses Prescott intemperate before he became deranged? He was. When I first became acquainted with him he was a correct and industrious man, a kind and affectionate husband and parent; but afterwards he became excessively fond of intoxicating liquors, which fondness increased with his years, until it became necessary for the Judge of Probate to appoint him a guardian. He was intemperate before he was deranged, and his intemperance, in my opinion, was the cause of his derangement.

*Rufus Wyman, M. D.* Have been the Physician and Superintendent of the McLean Asylum for the Insane, at Charlestown, for about sixteen years, since 1818. Was present and heard the cases of insanity and somnambulism read by Mr. Peaslee, and consider them as received medical facts, well authenticated. Dr. Abercrombie, one of the authors quoted, is an author of high standing; and cases analogous to those quoted are stated by other writers of authority. That insanity is a hereditary disease, i. e., a predisposition to it may be transmitted from one generation to another, is now a medical fact everywhere admitted. During my

superintendence of the asylum, ten hundred and fifteen patients were admitted, whose cases have come under my examination, and of those, one hundred and twenty-two had insane ancestors in a direct line, and fifty-nine had insane collaterals, where no insane ancestors were known. This number is much less than has been reported in other countries. In England, for instance, the proportion is nearly fifty per cent of insane ancestors and collateral of the patients, in three lunatic asylums. Insanity in ancestors or collaterals is no evidence of its existence in a succeeding generation. It produces a predisposition in the family or race. Hereditary insanity frequently exhibits itself without any known or apparent cause, as do certain other hereditary diseases, such as scrofula, epilepsy, consumption, gout, etc. It may, and does frequently, exhibit itself suddenly, and go off as suddenly, or exists for an indefinite period, according to the constitution and temperament of the individual. In this respect it may be similar to other hereditary disorders. There is no known period of its continuance, and two cases are seldom found alike. The disease is sometimes manifested by a sudden disposition to violence, and sometimes to great violence, but I do not remember that I have seen any case where the first symptom was a disposition to kill. I have known the first symptoms of a paroxysm to be indicated by sudden acts of violence, such as kicking, biting and striking. Cases of this kind have occurred in the asylum.

A patient in the asylum, of a kind disposition, is subject to

alternations of depression and excitement, with an intermediate state of apparently sound mind. The changes from these states is usually gradual, but I have known him to change very suddenly. When depressed, he is silent, inactive, careless of dress, etc. One morning he partly dressed in the clothes he had worn for several weeks in a state of tranquility. He instantly cast off the clothes put on, called for his best suit, was gay, talkative and passionate, and would strike, kick and bite without provocation. This is the most remarkable instance of a sudden return of a paroxysm which has come to my knowledge. Have known some cases where the attack came on suddenly, but so far as my observation extends I have found the disease usually to make its approaches gradually, sometimes for years, in so imperceptible a manner as to escape the notice of friends. In such cases the subject becomes in fact deranged before his family discover any symptoms of the disease.

It is an undoubted fact that a man may be insane on a particular subject, and appear perfectly rational on all others. This is termed monomania; and a vast number of cases of this and other forms of insanity might be related if desired. I am not aware that in monomania there is usually any difficulty in discovering the early symptoms, unless the patient be affected in a way to induce a concealment of his peculiar malady. Persons thus affected are not conscious of their delusion. Their belief of imagined facts is as strong to them as that of real facts to the perfectly sane. If an insane person believes an act

to be right which he knows others think to be wrong, he may act from his own belief, and yet attempt to conceal the act that he may avoid the punishment which others would seek to impose on account of their belief that the act was wrong. The insane generally are impelled to the commission of strange, enormous and unaccountable acts, by what they think a duty, and not unfrequently boast of such acts.

Somnambulism, or sleep-walking, is a different affection from that of insanity, though in some respects allied. Have known only two or three cases of somnambulism. One was that of a young lady, brought to the asylum in 1831, at the age of twenty-two years. When thirteen or fourteen years old she was subject to fits of somnambulism. She would often rise from her bed in this state; and frequently while in company or a party would rise from her chair, her eyes wide open and staring, walk the room, dust the furniture, brush down cobwebs, call by the right names the persons whom she met, play checkers or draughts. Once, having beat her uncle, she exulted in the victory. While thus affected, throwing cold water upon her or shaking her never awoke her. She was

put in bed and held down; would attempt to get up three or four times, then lie still, and in half an hour appear like a person waking from sound sleep, and afterward have no knowledge of what had occurred. She was thus affected from one to four times in twenty-four hours, for five or six weeks, and recovered. She afterwards became deranged, and so remained until she died.

A paroxysm of insanity may be induced by excessive mental or bodily exertion; by any labor or posture of the body which would cause a great flow of blood to the brain. Severe muscular exertion in this way might bring on the attack in persons predisposed to the disease. Pain in a carious or sound tooth may be produced by indigested food in the stomach, by worms, and other causes of irritation in the bowels, and in females by a state of pregnancy or nursing. Insanity is often caused by similar irritations. Somnambulism and dreaming are also produced by similar states of the stomach and intestines.

I recollect but one case where a somnambulist was disposed to violence; that is a case related in a note to Watkin's edition of Bichat on Life and Death:

"A respectable farmer, advanced in life, who has been a somnambulist from his infancy, who in his nocturnal rambles has committed many an innocent robbery on his mother's larder, not many years ago arose in the night, dressed himself completely, and to the inexpressible terror of his lady, seized the bed, with her in it, carried it into an adjoining room and placed it on the hearth. After this wonderful exercise of muscular strength, he walked to a house at some distance, occupied by one of the servants, roused him up, and in so distinct and particular a manner ordered him to set off immediately in a wagon with certain produce of the farm to a neighboring town, and there wait his arrival, that the servant did not hesitate to obey. The gentleman then returned to his affrighted lady, quietly undressed him-

himself, and passed the remainder of the night in bed. Upon waking next morning, and discovering to his unfeigned astonishment that his eyes were directed up the chimney, he demanded of his wife how and why the bed had been placed in such a situation. The irritability of his temper is so great on these occasions, that any attempt to impede or contradict his inclinations would be attended by most dangerous consequences."

Am acquainted with the hospital at Worcester, but do not know the proportion there of insane ancestors or collaterals. Aaron Locke was tried in Middlesex for the murder of his wife. I was not present at the trial, but communicated with the counsel before trial.

*Mr. Sullivan.* I understand, doctor, that insanity is in some cases hereditary. Now, if an insane man has a grandchild who commits a homicide, would you

infer from the fact of his ancestor's infirmity that the murderer was himself insane? The act might be connected with circumstances going to show the existence of insanity.

*Mr. Sullivan.* If no act of violence precede or follow the fatal deed, and no apparent motive can be found for the murder, should you believe a homicide to be insane merely because he had insane ancestors?

*Mr. Bartlett.* Objected to the question as improper. To suppose a case, and to ask the opinions of medical men on such a case, was, he contended, stepping out of the province of the jury.

The *Attorney General* replied that he could perceive no ground of objection. The prisoner was setting up the plea of insanity, on the ground that some remote ancestor of his was crazy. The Court would perceive that the question was only to get the opinion of the witness on a case precisely such as may be proved to exist in this instance. If improper, however, he would not press it.

The COURT observed, that the question being founded on a supposed case, could not properly be put, as it could elicit nothing more than an opinion, which would not be evidence for the jury.

*Dr. Wyman.* Insanity may come on suddenly, when hereditary or not hereditary. It assumes all varieties of appearance. Never knew a case of insanity to come on suddenly and last for a less time than two weeks. It frequently goes off as suddenly as it comes on. New exhibitions of the disease are constantly arising, and new cases are perpetually occurring. There is no regularity in the duration of the disease. It extends from two or three weeks

to eight or ten, or more, years, sometimes intermittent and sometimes continued with no intervals of sanity. The approach of insanity is usually gradual. In its incipient stages, the friends of the patient often perceive no indications of the disease, though frequently after its full manifestation they can look back and recollect circumstances which prove a disordered state of mind. A disposition to violence is generally discoverable before acts of violence are committed. The

proportion of cases of sudden impulse to violence is small compared with those where the manifestation is gradual.

There is some analogy between dreaming, sleep walking and insanity. The exciting causes of each may in some respects be similar. The patient who recovers from insanity speaks of having been waked from a dream. Should not say that sleep-walking was evidence of insanity. Monomaniacs are generally perfectly rational on every subject but the particular delusion under which they labor. (*Dr. Wyman* here related the case of a gentleman in the asylum who imagined some person was perpetually throwing chlorine gas upon him, etc.; also of a lady who supposed she was dead, and insisted on being buried, etc.)

Severity to brutes has in some cases preceded insanity, as in the case of a gentleman in the asylum. He was a farmer of very industrious habits, and temperate; became passionate and violent; chained his horse to a tree and whipped him unmercifully, and whipped his oxen; soon afterwards was manifestly deranged; grew jealous of his wife; got a gun to shoot her, but was secured and brought to the asylum. He was afterwards discharged, not as a person recovered, but for trial of his powers of self-control. He is now in the Worcester hospital as a dangerous lunatic.

*George Parkman, M. D.* Until the establishment of the public asylum for insane persons, near to Boson, I there had a house of that description. I have ever since continued to attend to insanity, and to subjects which are allied to it, and to record obser-

vations relative to it. In regard to a question of the Attorney General, viz.: "If the grandchild of an insane person commits a homicide, no violence on the part of the grandchild having preceded or followed the homicide, and no motive appearing for it, would the fact of the grandfather's infirmity lead to the inference that the grandchild was then insane?" The fact would suggest a strict review and inquiry should be made into the course of life of the grandchild, in search of an explanation of the homicide, by comparison of it with his other acts. Insanity is accounted, by persons who are conversant with it, to belong to the set of diseases which are generally considered to be hereditary. Some people seem to be born with a predisposition to some one of these diseases. They may escape it, if they escape exposure to the causes which seem to excite the actions in which it consists. This may explain its non-appearance in certain individuals, in one sex, and in a generation of a family; and the recurrence of such causes may occasion the diseased condition to be recognized in a succeeding generation. Resemblances in form and features are sometimes more readily traced between grand relations than between parents and children. This was noticed in the family of the late President Jefferson. I know a young girl who strongly resembles her great aunt and her second cousin (the aunt's son), between whom and the girl's parents there is very little resemblance. Insanity presents great varieties of form and duration. Sometimes the beginning of a paroxysm is marked by an act of



violence, especially if, as in sleep-walking, the sufferer is unskillfully thwarted in his vagaries. Insanity, like some other diseases, is sometimes regularly intermittent; the sufferer is quite reasonable, and the contrary on alternate days. Many facts seem to point to the conclusion that the knowledge of deeds of enormity leads to a repetition of them. In certain vacant, ill-regulated minds they seem to induce a sort of state of temptation, of headlong, almost irresistible propensity or impulse to like deeds and excesses. In the newspapers and public journals in which suicides are related, a solitary case is seldom found. Not unfrequently many cases occur in one neighborhood within a very few days. In the public accounts and histories of insane people, more of them are stated to be between the ages of twenty and thirty than between any other two proximate ages. The first appearances of insanity are generally attended with a disordered condition of the digestive organs. In disturbed states of the constitution, severe pains about the teeth are sometimes experienced, without any apparent local cause.

*Dr. Wyman* (recalled). I knew a young gentleman who recently came to Boston on a visit to or with his sister, and was suddenly seized with a paroxysm of derangement, rushed into the street and entered a shop, and attempted to stab the female who kept it. He was seized and brought to the asylum, where he remained a week, when his father came for him and found him perfectly recovered. He has had no return of the malady. There is generally a reluctance on the part of

the friends of the insane, to admit that the disease is hereditary in the family, and the fact is frequently communicated in the strictest confidence to physicians, with a request that it may not be made known.

*Dr. T. Chadbourne*. The books from which quotations were read yesterday by the prisoner's counsel are, with the exception of two recent works with which I am unacquainted, standard authors, recommended by the Medical Society of this state as text-books for students. They are considered the best printed authority on the subjects on which they treat. I concur in the doctrines and opinions relative to insanity advanced by the physicians that have preceded me. That there is a constitutional predisposition in certain families to mental derangement, occasioning an hereditary tendency to disorders of the mind in particular individuals, and that cases of very sudden accession of insanity sometimes occur, without any known premonitory symptoms, and as suddenly leave the patient, are well authenticated facts, and are so received by the most intelligent physicians of this state, as far as my intercourse with them extends. There is a great analogy between dreaming and somnambulism, but both differ essentially from insanity. I have known no instances of sleep-walking in which a disposition to injure others was particularly manifested.

A remarkable case of somnambulism occurred in Maine a few years since, in which the patient apparently attempted to injure himself. I was acquainted with some of the circumstances of this case. The patient was a brother



of the late Dr. Chandler, of this town. The attacks were so frequent, occurring almost every night, that he required watchers, the same as a person in the delirium of a fever. He always attempted to escape from his keepers, and sometimes effected it. Soon after escaping one night, an outcry was heard from the pasture, and he was found suspended by a rope from the limb of a high tree, at so great a distance from the ground that ladders were procured to reach him. He did not die; he luckily attached the rope to his feet, instead of his neck, and received but little injury.

A case of dyspepsia is related in Johnson's Medico-Chirurgical Review (July number for 1831), in which the patient always manifested a propensity to commit suicide whenever there was indigestible food in his stomach.

*Cross-examined.* I don't know that cruelty to animals has been often noticed as a precursory symptom of insanity. Don't know how long the habit of sleep-walking continued in the case alluded to—certainly for several weeks; know nothing of the history of the case after he attempted to hang himself.

*Dr. Nehemiah Cutter.* I have

A man, twenty-one years of age, has been afflicted with epileptic fits for about seven or eight years. About eighteen months since he was attacked with delirium, in which he was violent, and struck his father and mother, and everybody that approached him. He was confined, and the delirium continued about two weeks. After he recovered from it, his father placed him under my care; he has had several paroxysms; they come on suddenly, and one of the first symptoms is a disposition to fight or strike. He is cunning, and lays his plans to attack whoever comes his way. He feels, or thinks, that everybody is at war with him, and he with them. He would slay, if he could, any person, and I have not a doubt but he would kill a child without hesitation. These paroxysms of delirium vary in their duration. This man has been my patient about fifteen months, and

kept a private asylum for lunatics for the last fifteen years in Pepperell, Mass., and have had more or less for sixteen years in my family. The cases read yesterday are received medical facts, as far as I am acquainted. Abercrombie is an author of sound reputation. Insanity often lies dormant in one generation and manifests itself in the next. Hereditary insanity may manifest itself without any known cause. It is often sudden and intermittent. Persons predisposed are most likely to suffer the attacks between the ages of twenty and twenty-five. In most cases the symptoms are not discovered so soon as they in fact appear; friends and acquaintances do not at first notice occasional periods of exhilaration or depression which affect the patient, but after the case becomes confirmed they can look back, and circumstances instantly come to their recollection, showing the early period of the attack. Delirium may come on suddenly and go off as suddenly. It is sometimes accompanied by an irresistible disposition to do violence and kill. I will give some of the cases I have observed in my practice.

has had five paroxysms of delirium. The duration of each has differed; the first continued about two weeks, and the last only twenty-four hours. He recovers from them suddenly, and has no recollection of anything that transpired during that time.

In 1832, I had a patient, a married woman about fifty years old, who had sudden paroxysms of insanity, during which her reason was suspended and her conversation was irrational, incoherent and profane. These would sometimes continue fifteen, twenty, thirty or sixty minutes; then she would be perfectly rational, and wonder that she had such feelings, and said she had a whirling sensation in her head, which seemed to carry her up into the air, and everything around her was in a whirl and confusion. She recovered and returned to her family, and continued well six or eight months; then became rather melancholy, and last spring attempted to commit suicide by cutting her throat. After she had made the attempt she recovered her reason, and wished her friends to do all they could to save her life, and said she was not conscious at the time what she was doing. She recovered, and in five months afterwards made a second attempt, but did not succeed, and manifested the same desire to preserve her life, and was equally unconscious of the act.

A young man about thirty years old, who imagined he had made a league with God, and that he had given him power over the elements, and he could control them at his option. He could produce tempests, with thunder and lightning, heat and cold, at pleasure, and frequently said if we did not please him, he would "cause the earth to open and swallow us up, or the lightning to strike us dead in a moment;" and he frequently said it would not be wrong for him to kill a man, if he were in his way or opposed him. He often declared that we had better be careful how we treated him, for his Heavenly Father had given him the disposal of all human life, and we held our life in him on sufferance. He was perfectly rational on any other subject disconnected with this.

A married woman, about forty years of age when under my care, and is now about fifty, imagines she was changed or spiritualized; refused to be considered a wife, and resumed her maiden name and would not answer to any other name. She said she had constant intercourse with her Heavenly Father, her body was incorruptible, and she never should die; always should exist in her present body. In all other respects, and on other subjects, she conducted rationally. She remains in the same state of mind.

A young unmarried lady, about twenty years of age, imagined she had no soul; she said it was in hell; the devil had taken it, and her body moved about without it. She was perfectly rational in her conversation on every other subject, her judgment was correct, and was capable to perform business as usual. She recovered.

A young man, about twenty-five years old, a clergyman by profession. He imagined he had committed the unpardonable sin, and said there was no hope in his case. His mind was rational on any other subject, his opinion and judgment on theological points was correct, and he would carry on an argument with as much power and correctness as formerly. He recovered.

A young lady, about twenty-six years old, imagined her stomach was gone, and there was a vacuity in that part of her abdomen. She imputed the removal of her stomach to the vengeance of God on account of her sins. She said she constantly felt the burning of hell. She was in all other respects perfectly rational. She also recovered.

Monomaniacs themselves are often desirous to conceal their particular malady, and their friends are generally disposed to do so. Their situation can hardly ever be drawn out of their connections, except by close questioning. In cases of this description I usually make the most thorough inquiries. I have more patients through the months of June and July than in any other months, but cannot say that these attacks are peculiar to any season of the year.

*Mr. Bartlett.* Have you observe the manner and appearance of the prisoner at the bar?

*Mr. Sullivan.* I object, may it please the court, to the inquiry, as improper to be made.

*The Court.* As a question of skill it is admissible; the jury will weigh its propriety.

*Dr. Cutter.* I noticed the appearance of the prisoner at the bar yesterday. The motion of his eye is idiotic, dull, lazy, indifferent; no appearance of fear or anxiety in his countenance; no signs of any attempt at feigning; could not deceive one practiced in examining idiots. In general, cases of this kind of insanity settled down into confirmed idiocy. Noticed no agitation or anxiety in the prisoner during the examination of the two first witnesses on the part of the government; paid particular attention when Cochran testified.

*Cross-examined.* Dullness of the eye no certain mark, for instances are known of persons of

dull and inanimate countenances possessing minds of a high order; but in the appearance of the prisoner's eyes I should think there was evidence of idiocy rather than insanity. In insane persons, the motion of the eye is quick and brilliant; in that of the idiot, dull, motionless and heavy.

*Dr. William Perry.* Have given the subject of insanity considerable attention for several years, and have been frequently required to testify in cases where persons were supposed to be affected. The books read yesterday are standard medical works, and the cases quoted are well authenticated. Insanity is a hereditary disease in some cases, and, like other hereditary diseases, depends on constitutional formation, whatever that may be. It is a received opinion that insanity originates in a disturbed state of the nervous system. The centre of that system is in the brain. Persons having large heads, no certain evidence of insanity, though it may indicate some bodily disease. It is sometimes attended with early mental developments, as in the rickets, where the faculties of the mind seem to be sooner called into action. Early development of the brain, attended with unusual development of intellect, sometimes thought to be dangerous. Insanity, somnolency and dreaming are allied in one sense of the word. Insanity comes on and goes off suddenly. It is mani-

fested by both good and bad acts; depends on constitution; no limits to it. I have read numerous cases where the first symptoms of it were inclinations to kill. There is difference between monomania and insanity. It is a fact one may be insane on one, two or more subjects, and lucid as to all others.

*Cross-examined.* A disposition to kill, or to do unlawful acts, is almost universally followed by other similar acts, but might be prevented by extraordinary circumstances. A predisposition to commit murder or suicide might be cured by the patient suddenly coming to a consciousness of his infirmity, when the shock is so great as to prevent a repetition. Where the excitement is strong, the disposition to do violence is generally spoken of; the insane person is not apt to conceal his purposes. I never knew a case of insanity of shorter duration than four or five days.

*Abigail Calef.* Saw Mrs. Cochran a few weeks before her death and conversed with her about the January transaction. She remarked that her escape was truly

wonderful; it was a great mercy that they were not both killed. I told her I would not keep such a boy. She said Prescott was a good boy; she had no doubt he was asleep, and did not intentionally hurt them.

The *Attorney-General* objected to this kind of conversation being put in as evidence.

The COURT remarked that its bearing could not be distinctly seen, but there was no tangible reason for ruling it out. In cases of this kind, if there be any doubt, the testimony should be received, and the jury could give its true value.

The *Attorney-General.* The conversation merely shows Mrs. Cochran's belief; no fact, such as would be evidence for a jury. We might as well offer testimony of a belief that he was not asleep, but in the full exercise of his faculties.

The COURT. Yes; if you put in the winter transaction as evidence of malice.

The *Prisoner's Counsel* here rested the defense for the present.

#### FURTHER WITNESSES FOR THE STATE.

*Norris Cochran.* Had a conversation with the prisoner in relation to his killing Mrs. Cochran, in September last, at the State Prison. Asked him how he could do such a deed without provocation, as he had nothing against her. He said he was put out for what she said to him. He thought from what she said that he should have to go to prison, and therefore killed her. Asked him if he didn't know that his fate must be far worse than going to prison, if he killed her.

He said he did not stop to think of the consequences.

*Cross-examined.* Wm. Knox was present when I saw Prescott at the prison. Chauncey Cochran went in and a number of others. Prisoner did not say what Mrs. Cochran said, but he was offended at what she did say. Was there but a short time. Mr. Peaslee and Mr. Bartlett went in as I came out. Prisoner did not state deceased had reprimanded him for wearing out his clothes, nor that he killed her for that.

*Mr. Sullivan.* Did you ever hear Chase Prescott say his father was not insane?

*Mr. Bartlett.* I object to the inquiry. Chase Prescott has been on the stand, and you should have asked him.

*Mr. Sullivan.* We wish to show that he has told many different stories in relation to the pretended derangement of his father.

The COURT. The evidence is incompetent.

*Mr. Cochran.* As I lived a neighbor to the parents of Prescott, soon after the murder I went in and talked with them about it. The old lady, his mother, said he must have been crazy when he did it. His father said he was not crazy, any more than the devil was. He said the devil was in him; he never knew one of the Prescotts who was crazy. Was on the spot about twelve on the day of the murder. The grass was trodden down; comb, calash and stake on or near the spot trodden. The body had not been removed; persons there keeping people off the spot where grass was trodden.

*Timothy Robinson.* Reached the spot where the body lay, on the 23d of June, between nine or ten; nobody there but Mr. Cochran; did not notice the appearance of the place; was gone twenty-five minutes after a physician. Several were present when I returned; comb and calash lay within a few feet of each other; for four feet round the grass much trodden.

*Henry M. Robinson.* Reached the spot where it was supposed Mrs. Cochran was killed, precisely fifteen minutes before ten; grass was ruffled, trod down some; comb, calash, etc., lay on

the spot; basket, half full of strawberries, turned partly over. Think the grass was not more trodden than her falling and dragging away would occasion.

*Dr. Samuel Sargent* (recalled). The appearance of the grass when I got to the place, was as if trampled down four or five feet round; comb, calash and basket lay on one side; I was going to examine, when Jonathan Robinson objected; said he wished no one to go on the spot. The comb was large, such an one as ladies wear on the back of their heads; one tooth was gone.

*Cross-examined.* Six or seven persons were present when I reached the scene of murder. Death is as likely to ensue from a blow on the back part of the head as on the sides; directly on the temple perhaps a blow would as soon be fatal.

*William Knox.* Arrived on the spot about twelve o'clock. The grass, on or near which the calash, comb, club and basket canted down, lay, was trodden down in a circular form for six feet; should suppose there had been a scuffle. Once heard the father of the prisoner state, in conversation with Mr. Peaslee, that insanity was not hereditary in his family; that he never knew any of them to be crazy; that he had been almost crazy himself with the toothache.

*Cross-examined.* There was every appearance of a struggle; should have thought so had the spot trodden down been but half as large. The grass was high and trodden down, and you could see where the body was dragged off. I know Moses Prescott; he is, or was recently, under guardianship.

*Benning W. Sanborn.* Resided

in Deerfield forty-five years; was acquainted with Mrs. Blake while living, twenty or twenty-five years; lived within a mile, and saw her frequently, but never considered her crazy.

*Cross-examined.* There were troubles in Mr. Blake's family before and after he came to Deerfield; don't know the cause; they did not come to me with their troubles.

*Jeremiah Batchelder.* Live in Deerfield; knew Mrs. Blake; resided twenty-three years within thirty-five rods, and never heard of her being insane. Have heard of troubles in the family; don't know the cause.

*Dr. John Pillsbury* (recalled). Resided in Canada about thirty years ago; lived within half a mile of Mrs. Blake, and was well acquainted in the family. I never knew Mrs. Blake to be crazy; never heard or suspected anything of the kind.

*Cross-examined.* Mrs. Blake resided in Candia when I did. Was there perhaps once a week or fortnight. It strikes me she was once absent for a season, but do not know how long, or under what circumstances. She had a fever when at Deerfield, after I removed to Pembroke, and was transiently deranged by the fever, as is common in all fevers, but got well; never heard of her derangement continuing.

*Andrew O. Evans.* Was acquainted with Mrs. Blake about 34 years; she lived in Candia, I in Allentown, nine miles distant. In 1801 or 1802, Mr. Blake came to my father to get his aid in settling some difficulties between Blake and his wife. He went, and they became reconciled. Blake sold out at Candia, removed to Deerfield, about four

or five miles from where I lived, and opened a tavern. Knew Mr. Blake until his death, and Mrs. Blake until she removed to Lowell. Have been a great many times at their house, passing up and down, and never heard of Mrs. Blake being crazy, or deranged in the least. Have known the prisoner since he was a child. His parents live about four miles distant. The boy used to go to our school; lived sometimes at Mr. Kimball's, and I never heard of his being insane until since this prosecution commenced.

*Cross-examined.* Don't recollect of ever having seen Mrs. Blake but once in Candia; saw her often at Deerfield; don't know the nature of the difficulty my father went to settle; heard nothing of Mrs. Blake's straying away from home till today.

*Hall Burgin.* Was very well acquainted with Mr. Blake and wife. He used to do our tailoring, and I was frequently at his public house. I never saw or heard of Mrs. Blake's being deranged until I heard it mentioned here. I have heard of some difficulties in the family, but don't know their nature. I know the prisoner at the bar, and have known him since he was very small. He has lived near, and worked for me, and I never heard of his being insane.

The COURT suggested that this evidence was unnecessary, as the counsel for prisoner do not pretend that he was insane previous to the time of the killing.

*Mr. Bartlett.* We should rather they would put in their evidence.

*The Attorney-General.* We could prove the same facts by twenty witnesses.



The COURT. It must be presumed that up to the time of the killing the prisoner was sane.

*Mr. Burgin.* Never saw anything like derangement in the boy; discover no difference in the motion of his eyes since quite young. He is naturally downcast; has always been so; has a dull look.

*Cross-examined.* Did not know of Mrs. Blake's absence from home until yesterday; never knew any harm of the prisoner; cast of eye, looks, all appear the same as they ever did, except he is paler since he went to prison than before.

*John Johnson.* Have known the prisoner most of the time since he was a small child. He was absent some, but from 1824 to 1830 used to see him once a week, and sometimes every day in the week. He went to our school. Never discovered any symptoms of derangement, and never heard of it until since the murder. There is no difference in the appearance of his eye now from what it always was.

*Cross-examined.* I know no harm of the prisoner personally.

*Chauncey Cochran* (recalled). Prisoner lived with me three years, and never exhibited any symptoms of insanity. His parents visited me after the winter transaction, and said they never knew him to get up in his sleep before; said it was strange. No difference in his eyes; he always had a dull eye and a down look; motion of his eye slow; scarce ever looked any man in the face.

*Cross-examined.* Prisoner was living with me as an apprentice; was not bound. I once applied to Esquire Cochran to make writings; he advised me to have

nothing to do with the Prescotts.

*Samuel Cochran, Jr.* When I reached the place of the murder it was between twelve and one o'clock. The gass near where the calash, etc., laid, appeared trodden down in a circular form; one tooth was broken in the comb; one ear-ring in the ear unlocked; body had not been removed; am acquainted with prisoner; never insane; appearance as formerly; no difference in the appearance of his eyes; always dull, downcast and heavy, slow in their motion; his complexion now appears lighter.

*Cross-examined.* Visited prisoner in jail. Dr. Pillsbury was present; don't recollect others. Have not been employed as agent in the case; saw Mrs. Critchett at request of Attorney-General.

*John Kimball.* Am acquainted with the prisoner. He lived with me eighteen months before he went to Mr. Cochran's. Same motion of the eyes then as now; never insane; intelligent; showed no bad temper while with me. Afterwards he told me he would as soon kill his brother as not, if he got mad with him; then about fourteen years of age; good boy to work.

*Cross-examined.* Clever boy; did no hurt; no act of violence while he lived with me.

*Mary Critchett.* Have known the prisoner since four or five years old; passionate, ugly-tempered boy always; never bad to me. He would get in a passion with his relatives. Once he got mad and told his brother Jonathan he would as soon kill him as a snake. Didn't suppose he intended to do so. No difference in his eyes; always had dull, heavy eyes, slow in motion.



*Cross-examined.* His brothers were not very pacific; used hard words, but did not come to blows; three brothers of them; did not see any other boys so bad-tempered as the Prescotts.

*Francis Bickford.* Have been acquainted with the prisoner about twenty years; never insane; always dull-eyed, passionate; when six years old threw an ax at me for threatening to whip him. Never heard of any of the Prescotts being crazy until this trial. He was a boy of good understanding, intelligent as other boys.

*Cross-examined.* Ax did not hit; he ran off to the house; then about six years old.

*William Abbott, Jr.* Arrived at the spot of the murder about ten o'clock. Four persons were then present, Jonathan Robinson, his two daughters, and Mrs. James Cochran. I noticed the grass trod down from four to six feet round. There might have been a scuffle. Comb laid near her calash; saw her pulse had stopped beating, and went away. I have known the prisoner seven or eight years. His natural abilities I have always considered good. He was rather passionate. Knew of his whipping Mr. Cochran's cattle once or twice; had spoken of it to Mr. Cochran. His appearance now, as to his eyes, is the same as formerly; always had a dull, down look; slow motion of his eyes; would never look anybody in the face. He is a boy of good understanding, as to work, as any other. There were no strawberries in the field where the prisoner and deceased went.

*Cross-examined.* Have labored one hundred days, probably, with the prisoner, and never

knew him angry with any one. Prisoner and deceased must have got over a fence to have reached the lane from James Cochran's pasture. I found him first after the killing in that pasture, lying on his face, with his shirt under his head. He was making a noise like one crying in deep distress, but shed no tears. Asked him what was the matter. He replied he had killed Sally. I inquired how. He said he sat down by a root, having the toothache; there he supposed he got asleep, for he was conscious of nothing until he found he had killed her. He made no attempt to escape, and apparently slept soundly that night at my house. Asked him why he had taken off his shirt. He informed me he had thought of hanging himself with it, for he supposed they would hang him.

*Samuel Martin.* Have been acquainted with the prisoner from a child; always considered him a person of sound mind, as intelligent as boys in general; always had a dull, slow-motioned, down-cast eye. He was a passionate boy. I thought him bad-tempered from his being violent in his scuffles with other boys in my blacksmith shop.

*Cross-examined.* Have stated all the circumstances from which I infer that the prisoner was bad-tempered; he scuffled in earnest.

*Samuel Tuck.* Old Abraham Prescott had nine sons and three daughters. I was acquainted with some of them. I never knew any of the sons deranged. Marston Prescott was deranged, and used to drink cider.

*Jonathan Fellows.* Was acquainted with Abraham Prescott, the grandfather of the prisoner;

never knew him to be deranged: have heard that he was so; never knew of his children being deranged. He had nine sons and three daughters.

*Cross-examined.* Abraham Prescott was said to be deranged. I saw him three or four times a year. Marston Prescott was crazy; when forty or fifty years of age he was intemperate.

*Mary Leach.* Prisoner was committed to jail a year ago by the 24th of last June. He has ever appeared very sedate; of a sound mind, and paid strict regard to truth. Have had the care of him most of the time. He has been a very good prisoner; always behaved well; never insane; considered him not so intelligent as boys in general. He never talked much.

*Andrew Leach.* Am keeper of the jail in this county; never discovered any signs of derangement in the prisoner. He once freed himself of his irons, and attempted it again, when I removed them on his complaining that they hurt his ankles. Don't know that he ever made any attempt to escape; one was made from the apartment in which he was confined with others. His

intellect was not so good as that of boys in general.

*Cross-examined.* Inquired of the prisoner if he took part in the attempt to escape. He made no reply. Carr, who was in the cell at the time, was a bad fellow. The prisoner never made any exhibitions of bad temper; no complaint of it from his inmates. After I removed the irons from his legs, he made no attempt to escape.

*Amos D. Blaisdell.* Was confined in jail for a debt of fifty dollars at the time of the attempt to break out. The prisoner assisted in it, and talked of running into Canada. He blamed the boy for not watching better, so as to have prevented discovery by Mrs. Leach.

*Cross-examined.* Live in Deerfield; was in jail two months and fourteen days on a fifty dollar debt; staid thirty days after judgment; have not yet paid the debt. I am a shoemaker by trade; nothing but my hands to get a living with. Carr started the project of breaking jail; the prisoner seconded the design. I was not engaged in it; merely looked on.

#### FOR THE PRISONER.

*Jonathan Robinson* (recalled). Arrived at the place of killing next after my children. There were strawberries in the vicinity; saw them picked. The spot was on James Cochran's land; there is no fence between it and the barn belonging to the husband of the deceased, in the direction usually gone.

*Lucy Robinson.* Always lived the nearest neighbor to Mr. Cochran while prisoner resided with

him. Never heard any ill spoken of him, but have often heard him well spoken of. On the 6th of January, 1833, the prisoner came to my house and called me up, saying that he had struck Chauncey and Sally with an ax in his sleep. Went immediately to the house and found Mr. Cochran insensible and Mrs. Cochran able to speak. Prisoner was making lamentation in the other room. Never heard any complaint of

his want of attention during their confinement. Mrs. Cochran used to say that Abraham ought not to be blamed; if he had been awake he would have hurt himself as quick as them. Am acquainted with the field where Mrs. Cochran was killed. There used to be strawberries there; saw some at the time. Noticed the spot where the calash, etc., lay; saw no evidence of any scuffle; no marks of other derangement in the apparel of the deceased than would be consequent on removal by dragging.

*Cross-examined.* Didn't think of the place of killing being particularly retired, until I heard it mentioned; it looks lonely now. It is not, in my opinion, surrounded by woods on three sides; no house in sight; descent all the way from the barn to the spot. Strawberries had been plenty in the vicinity years before; I saw some then.

*Belinda Robinson.* Arrived on the spot next after Mr. Cochran and my brothers. The grass was

not more trodden down than I should have expected from the knocking down, etc. Was in that field strawberrying the year before, and went to it as the best place.

*Abner P. Stinson.* Went several times into the prisoner's cell, while here last September. He usually answered in the affirmative, whatever questions were proposed to him; seemed disposed to soothe the feelings of the questioners. Recollect accompanying the prisoner's counsel to his cell, and meeting Norris Cochran at the door; prisoner was weeping. When Mr. Bartlett asked what ailed him he replied that he had killed Mrs. Cochran. Don't distinctly remember what conversation followed. Was with Mr. John L. Fowler at the time of the confession he has spoken of. Think I either suggested then the motive the prisoner assigned for having killed Mrs. Cochran, or had done so previously.

#### IN REBUTTAL

*George C. Thompson.* Was present at the time of the confession spoken of by Mr. Fowler and Major Stinson. Removed McDaniel and then stood at the door. Mr. Fowler asked prisoner his motive for killing Mrs. Cochran. He repeated the old toothache story. Major Stinson told him that wouldn't go. Mr. Fowler asked him if there was any quarrel between them. He said no, he believed he liked her too well. He then went on to say that he insulted her by proposing an improper question; that she reprimanded him by calling

him hard names. He retired and sat down by a stump. He there thought she would inform Mr. Cochran, and he would have to go to the State Prison, to avoid which he would kill her. She had started for home, and was stooping to pick strawberries by the way. He seized the stake, came up behind her unperceived, and struck her on the head just as she was about to look up. When asked by Mr. Fowler as to the motive for the winter transaction, he said Mrs. Cochran once reprimanded him for running about Sundays and

nights, wearing out his clothes, and said if he didn't stop he would be no more respectable than his brothers; that he never liked her for that, and always remembered it.

*Cross-examined.* Was absent

removing McDaniel perhaps two minutes; never heard any other confessions. I recollect Major Stinson's observing that the prisoner's stories didn't agree very well.

MR. BARTLETT, FOR THE PRISONER.

*Mr. Bartlett.* May it please your Honor: Gentlemen of the Jury:—The Government demands of you the conviction of the prisoner at the bar upon the charge of murder. Having been requested by the Court to aid in his defense, I now rise to close what little remains of any service which his counsel may render him. The ordinary duties of our profession may become familiar by repetition, and we may come to the discharge of them with diminished anxiety and concern. But it is with me far otherwise, where the issue is life or death. Unimportant as may be deemed the efforts of counsel, I cannot release myself from the conviction, that whether made with fidelity or with negligence, they may have some connection, perhaps for weal or woe, with the destiny of a fellow mortal here and hereafter.

From the feeling of anxious solicitude with which I find myself oppressed,—I cannot be insensible to the awful responsibility of your situation.

The counsel of this unfortunate young man have not approached the discharge of their duties in this case, without a full—an almost disheartening view of the difficulties, ordinary and extraordinary, in all their magnitude, which were to be encountered.

In every case, the charge of a crime of great enormity at once enlists the virtuous feelings of the community against the accused. Even the forms of law aid in countenancing such prejudices. No harsher epithets are to be found in our language than this indictment sanctions—and although we may say, that the accused is to be presumed innocent until he is proven guilty;—yet no individual ever stood at the

criminal bar, when an influence the reverse of that was not produced upon our minds, by that situation alone. Yes—every eye in this vast assembly has been fixed upon this lad, to see “the murderer.” Every mind has already imagined in his childlike, inoffensive appearance, the indelible marks of blood-stained guilt. He stands here to contend with the Government. However exalted—however powerful an individual may be,—such a contest places him at fearful odds.

In no trial was there ever placed at the bar a more forsaken, friendless, helpless child of misfortune;—nor placed there under circumstances calculated to excite prejudices more fierce and unrelenting. If he is not sensible of his obligations,—his counsel cannot but feel grateful to the honorable Court, for affording all the facilities in their power to give to the prisoner a fair trial; but no pecuniary aid, which they could give, would ever supply the want of intelligent and zealous relatives and friends to aid counsel in their inquiries and remedy their want of knowledge of his life and habits.

Even in other places and other occasions, he might have had friends, such is human nature,—his present situation is not that in which kind offices are usually proffered. But destitute as he may be of relatives, who have either capacity, or means to assist him—limited as may have been his opportunities, in his humble condition of life, of attaching to him acquaintances and friends—two friends he had secured by a course of unexceptionable, exemplary conduct, not surpassed in any condition in life—a friendship partaking of parental kindness and affection: One of whom now sleeps in the grave—sent there by the hand of him who was to her as a dutiful son—while the afflicted, bereaved husband stands here his prosecutor,—stands here looking upon the accused, as if his hand had shed a parent’s blood, and illustrating in his feelings the truth of the great philosophic poet—

“How sharper than an adder’s tooth  
Is the ingratitude of a thankless child.”

In most cases of homicide, some doubt may exist as to the identity of the offender—some uncertainty whether the

wounds were the cause of death. Here no such doubt exists—no such uncertainty remains. The perpetrator stands unconcealed before you—the bloody garments in which the horrid act was accomplished have been exhibited—no apology—no excuse—no existing quarrel—no provocation is pretended. It was not to be rid of an enemy—it was not a contest with an equal. The victim was an unarmed, unoffending female—a sincere friend, an affectionate wife, a fond and devoted mother. The mangled corpse of the deceased—the affliction of the bereaved husband—the tears of motherless children, have been made to call aloud for vengeance. The tragic story has been repeated at every fire-side and every repetition has added new horrors. It has brought an exasperated, an enraged populace even around the doors of the temple of justice, demanding the execution of the accused, and impatient even of the delay of the forms of a trial.

If the nature of the charge, the character and manner of the offense, present difficulties to an impartial examination of the question of guilt or innocence: a difficulty not less formidable is to be encountered in the nature of the defense. It is insanity. Insanity! And what have we learned of insanity, but the incoherent ravings of the mad-man, or clanking of the chains of the maniac? Who will for a moment listen to the excuse of insanity for an act of such atrocity, from one whose whole life has been a regular and quiet and intelligent discharge of the duties of his humble station? Who has known of his being irrational? Who has heard of a single act of derangement of his. Here we feel how little we know of the human mind—the force of the truth that we are “fearfully and wonderfully made.”

How impossible to exhibit proofs of isolated acts of derangement, where the disease is not a total prostration of intellect—a settled and permanent mania? We have come to meet these difficulties as we may. The law has humanely allowed the prisoner the right of challenge—in effect, the right to choose his jury from the panel. In the selection, which has here been made, Gentlemen, his counsel have not sought

protection for the accused in the fears of the timid, or want of discernment of his triers. They have failed of their purpose, if they have not chosen for this responsible office, men of fearlessness as well as intelligence. Men, who have that true courage which dares meet the charge of cowardice—men, who will fear not to pronounce their own judgement, regardless of the clamors which shall assail you from the streets—or even within the walls of this house.

In proceeding to exercise the power, which the law has imposed or assumed to impose upon you, the counsel associated with me has eloquently urged upon you to divest yourselves of all influences, which popular feeling may have produced. I fear not, Gentlemen, that you will be under its guidance, if conscious that it directs or sways your judgment; but we must have shut all our senses, not to have seen and heard enough to convince us, that we are in the midst of an “infected district”—the poisonous influence of infection or contagion may be working their fatal consequences, while we perceive not their effect, till too late. Guard against every unfavorable bias: put away every unkind impression. Yes, “put the shoes from off thy feet, for the ground on which thou standest is holy.”

Judges, as you are, both of the law and of the fact, and called upon to take the life of this individual, it is competent for you—it is your duty to inquire, whence comes that power of life and death. If you believe you possess it—if still it be doubtful—or if the exercise of it be of more than doubtful expediency, you will demand the more clearness of proof—you will tread the more cautiously on such questionable ground.

I ask your indulgence to submit a few remarks upon the question of your right to take life; and if on that you doubt, I demand of you to stay your hand. If you have the abstract right to take life, permit me still to offer you some suggestions relative to the expediency of its exercise, not for the purpose of deterring you from executing the law, if the law is clear and the case already within it,—but that, if you see the exhi-



bition of a public execution in the county, would entail irremediable evil upon the community, you would find yourself compelled by your evidence, before you pour upon us that worse than Pandora's box, filled with unmingled evil, and not even hope at the bottom.

We are at once asked, how is it possible to doubt your power to take life? Is it not enacted in so many words in our statute book? Yes, and so once was there the like punishment for robbery, burning, burglary and witchcraft too: but whence does the Legislature derive the power of thus enacting? We may be answered: they have the authority of all ancient time and of almost every government. So has the rack, the wheel, and other engines of torture. Our immediate ancestors retained upon their list offences punishable with death more than two hundred crimes, until the efforts of Sir Samuel Romilly and other philanthropists recently reduced that bloody catalogue to one hundred and sixty-two. With such a list of capital crimes, with the aid of the engines of torture to make or extort proof,—we need not be surprised to find that seventy-two thousand persons perished on the scaffold in England during the reign of one prince alone, Henry the Eighth. The diffusion of light and the progress of improvement has, in its onward march in this country, left only a relic of this ancient barbarism. The number of offenses now punishable with death by the laws of the United States is only nine. But where does the Legislature find its authority of inflicting death as a punishment at all? In case of murder, it is urged, that the authority is from Deity—that it is the expressed command of God, that this command is found in the text that Whosoever sheddeth man's blood, by man shall his blood be shed.

The ecclesiastics of the early ages so sought for and so found in the scriptures occasions for the exercise of temporal power—at the same time, that by the interpretation of other texts they found means of averting its penalties from their own heads. This derivation of the power of taking life is like the origin of the "benefit of clergy," which is coeval with

it and derived in the same constructive manner, from the text, "touch not mine anointed and do my prophets no harm." Under this protection, the clergy would commit offenses with comparative impunity: and such were the times to which we look back for light, that all who could read were deemed to be clergymen, and peers and peeresses of the realm, even if they could not read, were admitted to its rights as of special grace.

The counsel associated with me has very forcibly urged that the words so often cited, are not a true reading of the original text. If they were, is a Christian community to be governed by the ordinances of the Jewish Theocracy? Then must we take the whole law of retaliation—"an eye for an eye, and a tooth for a tooth"—then may we renew the scenes of the 17th century under the comand "thou shalt not suffer a witch to live." Then must we abolish the whole code of Christian virtues and Christian morals. In the fourteenth volume of the *Christian Examiner*, an able essay may be found, in which it is contended that human murderers are not referred to in this text—but that the man is simply permitted or commanded to kill any beast that might occasion the death of a man, and that the original would be as literally rendered and more in consonance with the context—"Whatsoever beast occasions Man's death, by man shall his blood be shed." But if the original be truly rendered, is this a command, or is it merely a prediction? Dr. Franklin says, "I suspect the attachment to death as a punishment for murder in minds otherwise enlightened upon the subject of capital punishments, arises from a false interpretation of a passage in the old Testament—and that is, 'Whoso sheddeth man's blood by man shall his blood be shed.' This has been supposed to imply that blood could only be expiated by blood: but I am disposed to believe with a late commentator upon this text of scripture, that it is rather a prediction than a law. The language of it is simply that such is the folly and depravity of man, that murder in every age shall beget murder. Laws therefore (says this great philosopher), laws

which inflict death for murder, are as mischievous as those which tolerate revenge.' "

"Whose breaketh a hedge, a serpent shall bite him—Who-so removeth stones, shall be hurt thereby"—would equally well justify being construed into commands. The commentator referred to by Dr. Franklin, was the Rev. Wm. Turner, who says of that text—"to me I confess it appears to contain nothing more than a declaration of what will generally happen, and in this view to stand exactly upon the same ground with such passages as the following: 'He that leadeth into captivity, shall go into captivity—He that taketh up the sword shall fall by the sword.' The form of expression is precisely the same in both texts. Why then may they not be interpreted in the same manner, and considered not as commands but as denunciations? and if so, the magistrate will no more be bound by the text in Genesis to punish murder with death, than he will by the text in Revelation to sell every Guinea Captain to our West India planters."

Whatever reading, however, is given to the text so often cited, it cannot be distorted into an authority for our process of punishment with death. It was only "at the hand of every man's brother" that this vengeance was required. No, the law designed for universal application in all ages—the law proclaimed by Jehovah himself in the thunders of Sinai—the law unrepealed by the Christian dispensation, is, "Thou Shalt Not Kill."

Are we to be told, that the Legislature have enacted that murder shall be punished with death: and that there you must stop your inquires? Do not our courts judge of the constitutionality of laws, and decide them void? To you, in criminal trials, is expressly reserved the same power, and if our constitution had provided, that death in no case should be inflicted as a punishment, would you be bound to execute this statute? Whatever may be said of the union of Church and State, I hesitate not to say, that the principles of the Christian religion are the foundation upon which our government rests, and that no republican government can exist, that

does not recognize them. But for the sanctions of religion, what idle mockery would be the ceremonies and forms and oaths even of this solemn tribunal? That religion imposes upon us obligations above the force of human law, and for the violation of which no human law can give us dispensation.

Whatever, then, may be found in any human code, if the law of the Ruler of the Universe, if the Christian religion does not sanction the taking of life by human tribunals, then as you hope for future salvation, lift not in supplication to Heaven, your hands stained with the blood of your fellow man.

Again, it is urged that government acquire the right of inflicting death, as a punishment, by the compact into which individuals enter, when they form the social state. When individuals become members of civilized society, they do surrender a portion of their individual rights, and the society acquires the aggregate of all the rights thus surrendered by the individual members—and no more. Has then the individual this right over his own life, either to exercise or surrender? In other words—may he commit suicide? If he may not take his own life, when weary of it, with his own hand, may he then depute another to do it? May he agree, that five, ten, an hundred others shall unite in the act? Can he give to society what he does not possess—the right over his own life? Unless suicide can be defended, these questions admit of but one answer. I do not deny the right in the individual or society to take life—I admit it only in the single case of self defense—to preserve life. If my own or my assailant's life must be taken, I have the right to choose the preservation of my own. And so when the existence of society is endangered—but not for punishment. Can this theory of self-defense ever justify society in taking the life of a prisoner, who is completely in their power, and who can be easily restrained from violence, or any act to endanger its existence or its peace?

I present these considerations to you, as the judges of the

law, to say whether you have without any doubt the right which you are called upon to exercise—for I hold that if you have doubts as to the law, they, like doubts as to the fact, acquit the prisoner.

If the Legislature had the technical right to enact such a law, then I grant, however inexpedient it may be deemed, you are bound to execute it. But I shall submit to you some considerations upon its inexpediency, for another purpose. It is this: That if the execution of such law is attended with consequences only of unmixed evil, you should adopt no forced construction, create no presumptions, imagine no proofs, to bring a case within its operation.

The expediency of the punishment of death is attempted to be justified upon the ground, that the enormity of certain offenses requires a punishment the most terrible in form to deter others from the commission of them. Now if the class of the community upon whom the punishment of death is intended to operate, are but little influenced by its terrors; if the infliction of it has a direct tendency to demoralize and degrade the public sentiment; if it is subject to other insuperable objections, which apply to no other mode, then its expediency cannot be sustained.

It is in the first place, peculiarly unfitted to the object intended. Can we believe (says an eloquent writer) that the fear of a remote and uncertain death will stop the traitor in the intoxicating moment of fancied victory over the liberties and constitution of his country? While in the proud confidence of success, he defies heaven and earth, and commits his existence to the chance of arms. Will it arrest the hand of the infuriate wretch who at a single blow is about to gratify the strongest passion of his soul in the destruction of his deadly enemy?—Will it turn aside the purpose of the secret assassin, who meditates the removal of the only obstacle to the enjoyment of wealth and honors? Ambition, which usually inspires the crime of treason, soars above the fear of death. Avarice which urges the secret assassin, creeps below it. Passion, which perpetrates the open murder, is heedless

of its menaces. Threats of death will never deter such men. They affront it in the very commission of the crime. The uncertainty of the punishment reduces the chance of the risk to less than that, which is voluntarily increased in many pursuits of life. Soldiers march gaily to battle with a certainty that many must fall: while there is a chance of escape, the happy disposition of our nature makes us always believe it will be favorable to us. If the fear of death could deter from the commission of crime, then we should not see in the history of the plague in London, the details of the rush of thieves into the places of thick infection to plunder even the apparel from the dying victims of the disease; or accounts of similiar scenes in our own cities, during the prevalence of the yellow fever in ninety eight. In the testimony laid before the British Parliament upon this point, a solicitor of twenty years practice in the criminal courts stated, "that in the course of his practice he found the punishment of death had no terror upon a common thief, indeed it is much more the subject of ridicule among them, than of serious reflection. The certain approach of immediate death does not seem to operate on them, for after the warrant has come down, I have seen them treat it with levity." He observes, "I once saw a man for whom I had been concerned, the day before his execution, and on offering him condolence and expressing my concern for his situation; he replied with an air of indifference. "players at bowls must expect rubbers;" and this man I heard say, "that it was only a few minutes—a kick and a struggle and all was over!" The fate of one set of culprits in some instances had no effect, even on those who were next to be reported for execution; they play at ball and pass their jokes as if nothing was the matter. So far from being arrested in their wicked courses by the distant possibility of the infliction of capital punishment, says the witness, they are not even intimidated by its certainty. The Ordinary of Newgate, the individual of all men of the best means of observation, being asked on the same examination, what was the effect of the sentences of death upon the prisoners, answered,

“it seems scarcely to have any effect at all upon them. The generality of people under the sentence of death are thinking and doing rather anything than preparing for their latter end.” It may perhaps be thought, if it fail to produce any effect upon the mind of the convict, it still may have a salutary influence upon others by the public spectacle. Far otherwise. In some instances public sympathy may be excited. Then the culprit becomes a hero or a saint. He is the object of public attention, admiration and pity. Charity loads him with her bounties and Religion vouchsafes her blessings, and as in the case of the mail robber, Hull, he marches to the gallows with all the honors of a triumphal procession. In other instances the ferocious passions are excited and scenes of a different character are exhibited. The failure of any good influence from such a spectacle was illustrated at a public execution in Lancaster in Pennsylvania in 1822. An immense multitude attended the execution of a convict for murder. A paper of that city remarked—“It has long been a controverted point, whether public executions do not operate on the vicious part of community more as incitements to, than as examples deterring from the crime. One would believe that the spectacle of a public execution produces less reformation, than criminal propensity.” At the execution referred to, twenty-eight persons were committed to jail on the night following, for offenses such as larceny, assault and battery, and even murder. “The pick-pockets generally escaped, or (says the editor) the jail would have overflowed.” The murderer who was afterwards convicted, was committed to the same jail and had the same irons put on him, which had been laid off by the person executed, scarcely long enough to get cold.” At a recent execution in England for the crime of picking a pocket (and there stealing to the amount of one shilling from the person is punished capitally), fifteen new offenses were committed under the gallows, at the moment the convict was struggling in death. Another instance not less striking, was related at a public meeting in Southampton in England. An Irishman guilty



Let not this danger be lightly esteemed by those who have adverted to the records of human fallibility, even amid all the guards of legal forms. One of the sources of this danger is, where the afflictive dispensation of God is visited upon the mind of the unfortunate, and the melancholy effects of insanity are mistaken for the fruits of depravity. The mysteries of the human mind are known only to the Omniscient.

Evidence is daily accumulating of the thousands of instances, where persons in all the ordinary avocations of life, and even to those most intimate with them, show no aberration of intellect, who yet, on some subjects, are afflicted with all the madness of the maniac in chains. And this perhaps is first exhibited by some fatal act of violence. The case of Jensen, which has been referred to, cannot be read without shuddering at the thought: had he succeeded in the death of his beloved child, his mental malady would have been terminated only by an infamous punishment. The history of criminal jurisprudence is black with cases of conviction of the innocent upon circumstances, which deceived—upon testimony that was untrue, and even upon false confessions of the accused: cases, as has been said, which show “the danger, the impiety even, of using this attribute of divine power, without the infallibility that can alone properly direct it.”

The objection, however, in my mind, stronger than most others and one upon which I cannot well express all that I feel, is, in the attempt to make death a punishment, and to connect with it infamy and horror, and all the superstitious dread of ignorance and irreligion.

And what is death? Nature shows us that it is the cessation, or suspension of our physical powers and faculties. Our Christian faith assures us, that it is the transit from this state of probation to a more spiritual and permanent existence. What is the infliction of it then as a punishment? If it is the mere pain of its sufferings, they are ordained to us all, and perhaps in a much severer degree, than is endured by him, who dies by the hand of the public executioner. Let me ask any individual, who believes in the Christian scriptures, if he

would give his voice for the execution as a punishment of one whom he believed to be pardoned of Heaven, and that he would pass from the gallows to a state of perpetual beatitude? Would he be party to his death, in the belief, that the termination of his existence here was the introduction of one of never ending misery hereafter? Would he thus rebuke the delay of Divine justice? Then indeed do we assume "to be as Gods."

The effect of this system is to associate death with infamy and horror, to surround the grave with gloom, from the first impressions of childhood to the last period of consciousness. The influence of this for evil upon the character of individuals and upon community, in all its extent, cannot be described. When the association connected with death by the use of it as a punishment of infamy shall have ceased, when our conduct and our customs shall not say in language, louder than our Christian professions, that we look upon the grave only as a place of "gloom and dark despair," when our conduct and our customs shall better conform to a brighter faith, and drive from the portals of eternity the "gorgons and chimera's dire" with which ignorance and superstition have surrounded them,—then may the mind elevate itself from the earth, and chasten its contemplations with scenes beyond the hour of "life's feverish dream."

The good results thus anticipated, from the abolition of the infliction of the punishment of death, are not theoretical. The experiment, whenever made, has been attended with signal success. The Empress Elizabeth of Russia, soon after she came to the throne, abolished the punishment of death in all her extensive dominions. Her reign lasted twenty years, giving ample time to try the effect of the experiment, and Beccaria speaks with enthusiasm of the consequences it had produced.

Three years after Elizabeth had ceased to reign in the north of Europe, her great experiment was renewed in the south. Leopold became Grand Duke of Tuscany, and one of his first acts was, a declaration, rigidly adhered to during his

reign, that no offense should be punished with death. The result was in his own words, that his system "had considerably diminished the smaller crimes and rendered those of an atrocious nature very rare." During the twenty-one years of his reign only five murders were committed in Tuscany, while in Rome, where the punishment of death was inflicted with great pomp and parade, sixty murders were committed in the short space of three months in the city and vicinity. And it is remarkable, says Dr. Franklin, that the manners, principles and religion of the inhabitants of Rome and of Tuscany were exactly the same. The abolition of death alone as a punishment for murder produced the difference in the moral character of the two nations. An illustration of this point nearer to ourselves is furnished by a comparison of crimes and punishments in the district of London and Middlesex with Louisiana. This comparison for seven years prior to 1818 shows that murder which was punished capitally in both places stood higher in Louisiana in the proportion of twenty-seven to one—while the crime of forgery and counterfeiting in London and Middlesex, where it was punished with death, stood higher than in Louisiana, where it was not subject to capital punishment, in the proportion of eighteen to one.

Gentlemen, I am aware it may be said that such considerations should be addressed to some other tribunal—to our lawmakers, and that you have nothing to do with them. With all deference, I contend you have to do with them, and they demand your serious reflection in pursuing your investigation. That I may not be misunderstood, I again repeat my purpose in addressing these views to you. On the question of your right to take life, if your statute book contains an enactment against the spirit and precepts of your religion, may I not ask you to leave the direction of a fallible Legislature for the guidance of an omniscient God?

While I have heard on my way to this house respectable and serious men expressing an opinion, "that it is time somebody should be hanged, that the good of society requires a public execution," is it not proper to counteract such impres-

sions, such influence, by showing, not the uselessness merely, but the positive evils introduced by the infliction of capital punishment? May I not urge its abuse, its irremediable errors, as reasons for caution and for doubt in coming to the fearful result of conviction? May I not ask you to pause and reflect, as has been before stated to you, upon "the dangers, the impiety even, of using this attribute of Divine power without the infallibility that can alone properly direct it"?

With this statement of my purpose, and of my apology for detaining you so long with these general remarks, I will proceed to the more direct examination of the evidence in this case.

The general ingredients of the crime here charged are—The killing of a human being, by a person of sane mind, with malice aforethought.

These points the Government is to establish, and to leave in your minds no doubt upon either of them.

You will, I may presume, hear much urged in behalf of the State, in relation to presumptions—that a human being is presumed to be sane—that killing without provocation is presumed to be with malice aforethought; and such are the general assertions of that same law, some of the qualities and consequences of which I have considered. That view of it I here present to you, that you may not give to any of its maxims more weight than they deserve. There is more safety—more truth, than in all presumptions, to take only the fact, in each particular case, upon the evidence, with your own sense applied to find the result. And then, if convinced beyond all doubt, say so—but say it only upon better foundation than mere technical presumptions.

If it were proved that a person deliberately, without any motive, killed his best friend, what would be the technical presumption? That he was sane, and did it with legal malice. But what would be the conviction of common sense—the irresistible conclusions of your own minds? Most assuredly, that his intellect was deranged. And would you give up your own understanding, and hang the accused, because a legal

maxim could bring you to a result contrary to the fact, and prove an unconscious maniac sane and malicious.

A position, which I believe cannot be successfully attacked, and to which I shall have occasion frequently to advert, I here state in the original language of the learned Monsieur Georget, as found in the 10th *Bol. Med. Chir. Rev.*, 486: "An atrocious act, if contrary to human nature, committed without motive, without interest, without passion, opposed to the natural character of the individual, is evidently an act of insanity."

The mere mentioning of the word insanity brings before me in their dread array the difficulties we have to encounter in the common error—I fear too common, upon that subject. That opinion undoubtedly is, that to excuse from crime, it must be the madness of Bedlam,—that the entirely senseless maniac alone is irresponsible; but that to have the knowledge of right and wrong—of cause and effect—to have the capacity to devise and the art to execute schemes of violence and wrong, would at once take away all such excuse. Such is not the law.

While no other act in the life of an individual may have shown an aberration of intellect—while his knowledge of right and wrong, upon topics generally, may be perfect—while the means of judging of effects from causes may be entirely unimpaired—yet he may be subject to a morbid delusion of mind—a partial disease, termed by the profession monomania, not even discoverable to his ordinary acquaintance, and sometimes not seen by intimate friends, under the influence of which he is no more responsible for his acts than, in the language of Erskine, in the case when "the human mind is stormed in its citadel and laid prostrate under the stroke of frenzy." We have already read to you largely from the argument of this distinguished advocate on the trial of Hadfield, because he has there treated this most difficult subject with that philosophical research and legal discrimination which has not since been surpassed, and which cannot be impeached. Where speaking of the different classes of cases,

permit me to repeat again a sentence or two of what you have once heard :

“Another class, branching out into almost infinite subdivisions, under which the former and every other case of insanity may be classed, is where the delusions are not of that frightful character—but infinitely various and often extremely circumscribed—yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact; and those are the cases which frequently mark the wisdom of the wisest in judicial trials, because such persons often reason with a subtlety that puts in the shade the ordinary conceptions of mankind; their conclusions are just and frequently profound, but the premises from which they reason, when within the range of the malady, are uniformly false—not false from defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack. Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity.”

The views which I wish to present upon this subject are so well expressed by the learned Judge in the case of *Dew v. Clark*,<sup>14</sup> that I must take the liberty to give them in his own language :

“It may safely be assumed, at least to the present auditory, in the outset of this inquiry, that madness subsists in every variety of shape and degree. It subsists in the maniac chained to the floor—it subsists in the patient afflicted with mental aberration on certain subjects or on a certain subject only; and in respect of such even never betraying itself in violence or outrage. The affliction is the same in both cases and species—the difference is only in degree. The intermediate degrees between the highest and lowest grade of insanity are almost infinite. Patients afflicted with this terrible infirmity, in some minor degree often conduct themselves rationally in all but certain respects, and this not in show or semblance only, but in truth and substance. Instances have occurred of patients in Bedlam, employed as keepers, in some sort, of their fellow madmen; they themselves being at the same time essentially insane. It is well known, that a sufferer in this class, who fancied and styled himself, Duke of Hexham, became the agent of his own committee for the management of his own estate, and did for a time the duties of that office; it is said, not incorrectly. Few madmen are so mad as to be incapable of some degree of self control; and the cunning which madmen are often found to exercise, if bent upon carrying some

<sup>14</sup> 3 Adams, Ecc. 79.

favorite point, is a circumstance of the malady too well known to require any specific illustration. Instances again of the extraordinary power of, at times, concealing their infirmity, commonly inherent in madmen, are familiar to most people, as having occurred within their own personal observation. Still, however, with all this, among the vulgar, some are for reckoning madmen those only who are frantic, or violent to some extent. Insanity, however, decided, unaccompanied with such symptoms, they are content to refer to eccentricity or extravagance. Others, again, in the opposite extreme, are apt to confound mere folly with frenzy; and to describe as odd or eccentric, or in some such phrase, patients, who in better judgments, are actually and essentially insane. What, then, to come back to our proposed subject of inquiry, is the true criterion of insanity? and principally how is it distinguished (this being obviously our principal concern) from eccentricity or extravagance merely. The true criterion—the true test of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, delusion. Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or, at least, of being permanently reasoned out of that conception; such a patient is said to be under a delusion, in a peculiar half technical sense of the term; and the absence or presence of delusion, so understood, forms, in my judgment, the true and only test, or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether convertible terms—so that a patient under a delusion, so understood, on any subject, or subjects, in any degree, is for that reason, essentially mad or insane, on such subject, or subjects, in that degree.—The court is confirmed in, or rather possibly has derived this, its own view of the subject, by and from writers, as well as medical as others, best qualified to discuss it, and upon whose authority, accordingly, it may safely rely.”

I present these views to you, not with any pledge, or any promise that we can satisfy you, in proof, of the particular delusion with which the accused is afflicted; nor could it have been done in the case of Jensen,<sup>14a</sup> had he succeeded in taking

<sup>14a</sup> “While, in the act of correcting the press, that active and able physician, Dr. Otto, of Copenhagen, has sent for insertion in the next number of the *Phrenological Journal*, an instructive case of the same nature, from which, although not yet published, I am allowed to give a very full quotation. Dr. Otto entitles it, *Case of Sudden Propensity to Murder and Suicide*, and the narrative is as follows: Frederick Jensen, workman, thirty-seven years old, had for some time suffered from fits of giddiness, which always obliged him to keep hold of the nearest objects. In the spring of 1828 he



the life of his child; but to remove any impressions you may have, that insanity exists only where it is seen in a series of acts of violence and raving; and for the purpose of asking you to come to the conclusion that such a delusion did exist, if we show you that no motive and no occasion did exist for perpetrating the crime charged.

With the certainty of being tedious to you, gentlemen, I deem it necessary to repeat the substance of all the evidence,

lost a beloved daughter, which afflicted him very much. The state of his health was nevertheless perfect, in mind as well as in body, when he, one day (Sunday, the 28th of September, 1828), after dinner, told his wife that he would take a walk with his son, a boy ten years old. He did so, and went with him to the green which encircles the citadel. When he came there, he now relates, a strange confusion came over him, and it appeared like a matter of absolute necessity to him to drown his son and himself in the waters at the citadel. Quite unconscious of what he was doing, he ran towards the water with the boy in his hand. A man, surprised at his behavior, stopped him there, took the boy from him, and tried to persuade him to leave the water; but he became angry, and answered that he intended to take a walk, and asked "whether anybody had a right to forbid him to do so?" The man left him, but took the boy along with him. An hour after, he was drawn out from the water, into which he had thrown himself, and taken to prison. As he still showed symptoms of insanity, he was bled and purged; and two days after was brought into the hospital, and committed to the care of my friend, Dr. Wendt, who has perfectly cured him, and who kindly afforded me the opportunity to see and to speak with the patient. He now very quietly tells the whole event himself, but is not able to explain the cause of his suddenly arising desire to kill himself and the boy, whom he loved heartily. This cause is only to be sought in congestion of blood to the brain, the same which before had caused his giddiness; and whether we adopt an organ of destructiveness in the brain or not, it is to be assumed that the propensity to kill himself and the son arose from a morbid excitation of a certain part of the brain. The disposition to congestion originated from a fall he suffered on the head in the year 1828. We ask, whether anybody, in this case, would have admitted responsibility of crime, if the patient really had executed his plan to murder his son? This case affords a good illustration of my preceding statement, that frequently the crime is only the first palpable sign of existing insanity, and shows the necessity of scrupulous inquiry being instituted where an unnatural act is committed by an individual who would previously have revolted at it."—*Combe on Mental Derangement*, 226.

as well on the part of the State as of the prisoner. I would not willingly suppress or misstate any portion of it; for while some of the inferences which the counsel for the Government and the accused, and the result of the testimony to which we may ask you to come, may differ widely, I am desirous that you should be satisfied that the Attorney General and myself do not differ as to what that testimony is.<sup>15</sup>

The statement of the Solicitor in the opening of this case, and the course of the examination show us, that from this testimony the Government contend: That the deceased came to her death by the prisoner at the bar; that he is a person of a vicious and violent temper; that for wicked purposes, he induced the deceased, by false pretenses, to a place of concealment, where the death was inflicted; that, at that place, insulting language was used and violence offered; and that he took her life to prevent exposure.

On the part of the prisoner, it is admitted that the deceased came to her death by his hand.

But the other positions are each and all of them contested. So far from being proved, on the contrary we contend: That the predisposition to insanity is an hereditary disease, and has existed and been exhibited in his direct ancestors and collateral relatives for several generations; that the causes and indications of insanity in the prisoner were exhibited by diseases of the head even in childhood; that instead of being a person of vicious and violent temper, he is proved to have been a lad of peaceable and quiet habits; that the professed purpose for which he went to the field on the day of the death must have been the only purpose contemplated; that there is no proof of any other act of violence than the blows that caused the death; and, in conclusion, that his previous conduct, the circumstances attending the transaction and following it—the entire absence of all motive for the deed, and his whole deportment, are decisive evidence of that mental delusion which is already defined to be insanity.

<sup>15</sup> As the evidence is given almost in full (*ante*, pp. 747-787), Mr. Bartlett's recapitulation of it is omitted.

The evidence of the conduct of the prisoner in relation to the several other positions, I think may be more justly estimated by first adverting to the fact of the hereditary nature of insanity, and the proof of the taint in the blood of the family, as well as its early development in this individual.

On this subject a distinguished medical author (Burrows on *Insanity*, p. 100) uses this language:

"The doctrine of constitutional predisposition to specific diseases being propagated is not new. . . .

"The liability of mania, demency, epilepsy, leprosy, etc., to extend through future generations, is an opinion confirmed by the experience of all ages. . . . The development of insanity may escape one generation and appear in another; but no wise in this respect obtains. . . . It is of little real importance whether it be a predisposition, or the malady itself, which descends and becomes hereditary; but no fact is more incontestably established than that insanity is capable of being propagated. . . . Hereditary predisposition, therefore, is a prominent cause of mental derangement."

In support of this truth, I need not advert to the various other authorities which have been read, or to the clear and decisive testimony of the distinguished medical gentlemen who have been before you.

Can it be questioned, that the ancestors and relatives of the prisoner were thus afflicted? The grandfather, Abraham Prescott, lived and died insane. Not only Mr. Blake, Mrs. Poor and others, called on the part of the prisoner, but the witnesses for the Government, Mr. Tuck and Mr. Fellows, establish this fact. The nephew of the prisoner, Marston Prescott, whom the same witnesses knew for thirty years, was, in the language of the same witnesses, during the whole period, "crazy by spells." Moses Prescott, the son of Marston, it is not disputed, is now under guardianship on account of insanity.

The condition of another of the relatives you learn from the testimony of Deacon Abraham Prescott, who states that his brother's paroxysms of insanity were such that he was obliged to be put in confinement. The occasional derangement of Mrs. Blake, the aunt of the prisoner, is unequivocally

proved by Mrs. Huntoon and Mrs. Rowe. They state facts in relation to her conduct and deportment—their own conclusions at the time, and the judgment and opinion of others to whom the facts were then known. They were inmates of the family—residents in her house. The Government question the truth of the testimony, as to this individual—not by impeaching our witnesses, but by calling very respectable gentlemen to testify that they did not know the facts thus sworn to. From the books which we have cited, as well as from the witnesses of most experience, you have learned how universally true it is that the existence of this malady in a family is attempted to be concealed. You have heard the cases stated where this propensity was so strong that even the lives of friends have been put in jeopardy, rather than disclose the truth, even to the medical attendant. Surely, then, we need not be surprised that Mr. Sanborn or Mr. Batchelder, who lived in the neighborhood, or Judge Burgin, who lived some miles distant, might not be informed of her situation. Much less, that Mr. Evans should not be informed on the subject, who says he never saw her but once, and that on the occasion of a regimental muster he called at her house, nine miles from the place of his residence. Dr. Pillsbury speaks with great doubt and uncertainty as to the when, where, or what his acquaintance was with Mrs. Blake, except on one occasion she was sick, as he says, of fever, at Deerfield, and then “was deranged.”

The insanity of Mrs. Hodgdon, the half-sister of the prisoner, we prove by the testimony of his parents. You, no doubt, gentlemen, will be asked to credit with caution, if at all, their testimony in behalf of their son. Their situation is truly a painful one, and we would have avoided calling them, if the principal facts to which their testimony is directed were not of a character to be within their knowledge only. That they must have strong feelings in this case, it is impossible to deny—they must be more or less than human not to be affected by them. The prisoner is their youngest son—and, experience proves, not the less dear to them for the ap-

prehension they have entertained of the existence in him of the malady of the family. Well may it excuse the afflicted mother's exclamation before you, "How could Abraham have cruelly killed his best friend on earth, if he had not been crazy?" Poor and uneducated they may be, but no witness has been called to impeach their general reputation for truth.

From these witnesses you also have evidence of the early symptoms of insanity in the prisoner. They state to you what they were—the disease of the head—its unnatural enlargement—excruciating pains—rising in his sleep, etc. That such was the extent of the disease that medical assistance was called for repeatedly. To confirm this, Dr. Graves was called, who, although he has no recollection of any facts in relation to it, finds on his book charges for attendance and medicines he at divers times of the date stated by the mother and entered as for this child. It is true, the doctor undertook to add certain conjectures of his own—which we must beg leave to decline receiving as testimony. If we take his oath and book, so far as they support each other, it is all that, in conscience, can be asked of us.

Mr. Knox testifies, that on some occasion he heard Mr. Prescott say there had been none of his family crazy. Of this, there need be no doubt. Take the well-established fact—that in all classes there is an unremitted effort to conceal the existence of such a malady, and add to that the vulgar idea that it is an imputation of reproach—and we need not be surprised at proof of denials. It is also proved by Mr. Cochran that after the 6th of January, the father and mother both said they had never before known him to walk in his sleep. The circumstances under which this was said may not excuse, but may perhaps account for, the error of this statement. The lives of Mr. and Mrs. Cochran had been put in imminent hazard by the act of Abraham, supposed to have been done in his sleep. The parents could not but have felt themselves censured, for not having put them on their guard, by communicating the fact, in relation to this habit, and they might—they did improperly—deny it.

The Government has called before you many of the neighbors and acquaintances of this young man to testify that he has to them appeared to conduct with ordinary intelligence, and that before or since the horrid scenes of the winter and spring of 1833 they have discovered no evidence of derangement. All this disproves nothing that we attempt to maintain—that the act itself was the result of the inherent malady. Most of the numerous cases to which we have adverted, and which the learned gentlemen of the faculty have stated to you of unquestioned insanity, could have been met with the same proof, independent of the act itself, which established the fact of the existence of the disease. The same witnesses have stated that they discover no change in the appearance of his eye and countenance at this time from what it usually has been, while Dr. Cutter, who for sixteen years has given his whole attention to the examination and study of the characteristics of this disease, as exhibited in numerous patients constantly under his care, states that his appearance and manner, and particularly his eye, exhibit decisive indications of an unsound mind. He has stated to you some of those indications. And you are well aware that subtle and difficult of detection as are the signs of this malady, to the skillful and experienced its indications may be manifest, where no proofs would be discernible by ordinary observers.

The reverse of the position, that the prisoner has been of a vicious and violent temper, has been most triumphantly established, by the witnesses of the Government, and we had no need to add to their testimony in his behalf. Scrutinize the life of any lad, from infancy to the age of seventeen—bring into court proof of every act and every expression of passion, or of playfulness, and let them be related by witnesses, who have the fact established in their own minds, that he is a murderer—and who shall pass such an ordeal with the impunity of this young man? Improper language may be used—that indicates the character of the education, or rather want of it. The acts may show the temper of the party.

The good old Mrs. Critchett, whom you have seen here,

very naturally concludes, seeing that boy now, in her mind at least, is a murderer, when a mere babe was "very passionate"—at five years old, had "a dreadful temper"—Said divers bad things. How much this all rests in the poor old lady's imagination, you must judge when she informs you, that in all his daily intercourse with her own and the neighbors' children, she never heard of quarrel, or a complaint of any difficulty. But Mr. Francis Bickford comes to the proof of an overt act—not of treason, but of a murderous disposition,—that when Abraham was between five and six years old, he threatened to whip him, and the boy threw an axe towards him. And is the Government driven to the proof of such instances of provoked petulance in childhood for evidence of a murderous disposition? Take the testimony of Mr. Johnson, who knew him, as a school boy; of Mr. Kimball, with whom he lived near two years; of Mr. Cochran, with whom he had lived three years; of Judge Burgin, who had known him from a child; they swear, that in all their acquaintance, they know not a single act of bad temper.

I do not forget the statement of Mr. Cochran, of the case of cruelty to his oxen. Precisely the evidence, not of general bad temper, but in exception from his general character, of the existence of the malady, with which we say he is afflicted,—as testified by Drs. Wyman and Parkman in the case of Mr. Floyd at Roxbury. Had he possessed a bad temper, could he have lived there years in the family of Mr. Cochran, and in no instance have given any indication of it, either to the parents or children? Yet the bereaved husband of the deceased very candidly tells you, he never knew an instance of harshness—of unkindness—of ill temper toward any of his household, or any one else.

From what proof are you to be asked to infer that the prisoner left the house on the 23d of June with any other purpose, than that stated at the time? It cannot, for a moment, be supposed, that any other purpose could have been suspected by Mrs. Cochran. Such injustice cannot be done



to the memory of her whom all admit to have been a most amiable and exemplary woman.

The whole proof, on this point, rests in the attempt to show, that they went out of the course for gathering strawberries,—and into a place of concealment. Gentlemen, more—much more of imagination is necessary to be brought in aid of the proof here than it is safe to trust to, in the investigation of such a charge. What are the facts? To have returned from the field into which they first went, by the way they went to it, they must have passed two fences;—by crossing the fence where they did, they came into their own enclosure, in which a path led directly to the house. Many witnesses have been inquired of, if there were strawberries at the place where the death happened. Some have expressed an opinion, that it was not the best place for them, but they all admit, that some grew there. The place was lower than the field where they first entered. It is stated to have been toward the close of the season for strawberries, and you will judge whether it was not natural to seek them in the lower ground. On this point, you have the testimony of Miss Belinda Robinson, a young lady whose candor and intelligence cannot fail to have given her statements weight with you; and she says, that the year before, in going out for strawberries, she sought for and found them there, and knows it was a place resorted to for the purpose.

But how can it be made a place of concealment? You have heard much of the wood that was near. And yet the same witnesses say it was but seventy rods from the house,—and in one direction at least, in plain view for eighty rods—and strawberry fields in June, even on a Sabbath, are not the most solitary places, anywhere in the country. Mrs. Lucy Robinson, when inquired of, said she had often passed there, and it had never had occurred to her that it was a retired, or lonely place. But if we were allowed to go into conjecture upon this subject, how entirely is the supposition of any improper purpose overthrown, by the

circumstances of the transaction and the relation in which the parties stood. He goes at her request to ask the husband, then at home, to go out with her. Did he foreknow that the husband would decline? When did his wicked purpose first suggest itself to him? For three years, he had resided in the family. For days and nights, had frequent charge of the house, in the absence of Cochran, and in all this time, and all these occasions had a rude word been uttered?—had a rude thought even been suggested to that virtuous female? Most certainly not. His deportment toward her was with the most respectful deference. Did he then, at mid-day, in the open field,—almost in the face of her husband, offer an insult to her? If so, then who can say he had one trace of sanity left? What more conclusive proof of actual madness could be adduced?

However, it is further contended, that whatever may have been the purpose of going out, while there, insult was offered to the deceased, by the prisoner, and violence used;—and that he afterwards took her life, to prevent complaint from being made.

The only evidence in support of this position, independent of the prisoner's conversations, which stand by themselves, is in the situation and appearance of the body of the deceased, and of the ground, where the death was inflicted. And do you find there evidence upon which you can rest and say such facts existed? If the proof were decisive and clear, that the grass had been trodden in an unusual manner, it would not of itself be evidence, as the witnesses express it, of a scuffle;—that could not have happened without other and more conclusive proofs. They would be found in the discomposure of the dress—in marks upon the hands,—arms or body. But the weight of evidence is not that there was any extraordinary appearance in relation to the treading down of the grass. The testimony of the Government witnesses varies, on this subject, according to the vividness of the fancy of the individuals, by representing the track of all extents, from three, or four feet, to seven

or eight in width. But those of the witnesses for the Government, who were first at the spot, who seem to have acted on the agitating occasion with most self possession, and who are not surpassed by any, in the candor and clearness of their statements, or apparent fairness of intention, Mr. and Mrs. Robinson and their family, distinctly swear, that the grass was no more trodden, than the act of killing and taking away the body would naturally have occasioned. That there was nothing in the appearance of the place to excite a suspicion, that there had been any contest or scuffle. And as to any other proofs—or marks upon the deceased, or by the condition of her dress, the Government not only do not produce any,—but, on the contrary, their witnesses swear, that examination was made—the attention particularly directed to that inquiry, and no pretence for such a belief was found.

But the calash and comb were found at the place where the blows were given. And what is the inference? Do the Government ask you to believe they were removed before the blows were given—and by whom? If by the prisoner—after that was done, did the deceased remain in the same place and make no attempt to depart, while the prisoner went to arm himself with the stake? Did the prisoner commence such a contest, already armed with the deadly club? Remember the blows were given upon the back of the head. If any previous violence had been indicated, did the deceased so disregard it as to give an opportunity for such an attack upon her? Any hypothesis upon the idea of other violence, or even of insulting language, previous to the blows upon the head, is most preposterous and absurd.

There can be no doubt that the comb placed high upon the head, as such combs are worn, might with the calash be removed, stooping forward as the deceased probably was, by the blows which were inflicted and by her immediate fall upon her face, without its being more broken than it is represented to be, as the blows were below where it would have been placed.

But the prisoner's confessions are in the case. There is something that shocks us in the very thought that an act, which in all its circumstances is stamped with the evidence of insanity, is to be proved a crime by the declarations of the deranged person himself. And, especially, when the manner in which those declarations were made, as well as the declarations themselves, exhibit all the characteristics of a disordered intellect.

Look at the circumstances under which those declarations were made—and the declarations themselves. After several months' imprisonment on the charge of murder, he was brought to this place, during the sitting of the court, to be put to his trial upon the indictment for his life. The testimony of the Warden is, that he was much annoyed by visitors, and to their numerous interrogatories, his desire seemed to be, to give such answers as they seemed to desire. Mr. Thompson says, the prisoner was urged to give his motives for the act. Another person with himself, Stinson and Fowler, were in the cell,—he desired this other person to be removed and would tell—and proceeded to tell in presence of the three persons named, that he made an insolent proposal to the deceased—that she replied by some remark—said she would inform Mr. Cochran—took no further notice of what had been said, and continued picking strawberries. That he thought he must go to the State Prison—and took the stake and killed her. On being urged for his motive for the attack upon both, on the sixth of January,—he stated, that Mrs. Cochran had offended him by her remarks in relation to his wearing out his clothes. So much of this, as relates to the scene of the twenty-third of June was recollected and stated by Mr. Fowler. If he had assigned a sufficient motive for the deed, would it have been high evidence of sanity, to have made the confession in presence of three witnesses, on the day before he expected to be put on trial for the offense! And when you look at the declarations made by him, you are to take them as they are. You are not by your conjectures, or supposi-

tions to add to—or to alter them—to make them either more rational—or more sufficient for the occasion. If then he in truth made the insulting proposition, suggested to the deceased at the time and place stated,—under all the circumstances of his residence in the family,—what is the instantaneous answer of every one as to the condition of his mind? It is “he is crazy.” If the insult was offered—and was answered as is stated—and upon that inducement and motive, he proceeded to take the life of the deceased—is it an inducement, or motive for any other than a maniac?

I am aware of the undue importance attached to the word confession—however irrational, inconsistent, even absurd in itself—or under whatever state of mind it may be obtained. “Why confess if not guilty?” Why a deranged intellect should, or should not do, or say, whatever is most strange, or unreal, no rational mind will attempt an answer. The history of criminal trials shows us, however, that confessions even under other circumstances, are not conclusive proof of guilt. The case of the Boorns<sup>16</sup> in a neighboring state, who procured themselves to be sentenced to death upon confession of murdering a person, who appeared alive to resist the execution, has been often adverted to. In the volume I hold in my hand (Upham’s account of the Salem Witchcraft), I find the following remarkable statement. Speaking of the convictions for that offense, the writer says—“But there is one species of evidence which renders all the rest unnecessary and overwhelms the minds of the court, the jury and the public, and perhaps, in many instances, the unhappy prisoners themselves with conviction. The confessions. Fifty-five persons, many of them previously of the most unquestionable character for intelligence, virtue and piety, acknowledged the truth of the charges that were made against them;—confessed that they were witches, and had made a compact with the devil.” “The records of their confessions have been preserved. They relate the particulars of the interviews they had with the

<sup>16</sup> See 6 Am. St. Tr.

evil one." I cannot imagine, that any one of those fifty confessions contained more of extravagance and improbability than that which is here introduced as evidence.

Gentlemen, we have thus far considered this case without adverting to some of the circumstances, which, if doubts might remain upon the other evidence, are irresistible proofs of the insanity of the accused. They are those to which we have before proposed, in conclusion, to direct your attention;—his previous conduct;—the circumstances attending and following the scene of the fatal twenty-third of June; and the entire absence of any sufficient motive for the horrid deed of that day.

If the Government, in the absence of all proof upon the subject, could have asked you to presume from the act itself a wicked motive, their testimony, now before you, rebuts all such presumption,—removes all such pretence. We ask for no clearer testimony, in this respect, for the prisoner, or from a source more entitled to credit, than that of Mr. Cochran, the husband of the deceased. He testifies, that he not only knows of no motive for the act, but he states, that his uniformly kind treatment of all the family,—his invariably respectful deportment,—his exemplary conduct and fidelity, and the mutual confidence all of them reposed in each, were such as takes away all pretence for conjecture upon this point. Was he under bonds to remain, and did he wish to escape? His residence was voluntary and for a satisfactory compensation. Was he reluctant to labor—and were too severe tasks imposed upon him? He required no urging to do his duty, and always cheerfully volunteered to do labor, that was not required from him. What but the most unparalleled course of good conduct in the prisoner could have secured such undisguised friendship of the family as was exhibited by them, after the tragical scene of the night of the sixth of January? While the husband and wife lay bruised and bleeding under the blows he had inflicted;—while their lives were spared from his deadly attack, in the silence of midnight, apparently

by miracle;—did they not, in their long suffering and confinement with the wounds, review every act and every expression—and every look even, of his, while in their service, to find any cause of doubt, or suspicion of the sincerity of his apparent friendship for them? Most surely they did;—and so entirely did they acquit him of all fault, that it was painful to them to hear even a doubt of his innocence expressed.

Here, gentlemen, I ask your attention to the transaction of the night of the sixth of January. I hold, that the prisoner is alike innocent, or guilty of any criminal act in that and the bloody scene of the twenty-third of June. If he committed one murder on that day, he attempted two murders on the night of the sixth of January.

If he did not attempt to take the life of Cochran and his wife on that night in a paroxysm of delirium, whether called somnambulism or insanity is immaterial—then with some motive he attempted to murder both. If it is admitted that he then was irresponsible for the act from any cause, it is preposterous—absurd to look for any new cause for the deed of the twenty-third of June. I stand here upon this position. I call upon you to reflect and to examine, if it be not a sound one. I call upon the Government to satisfy you that the assault of the sixth of January was an attempt by the prisoner, in sane mind, conscious of the act at the time, with malice aforethought to kill the persons he then assaulted;—or to yield the point, that then, whether sleeping or waking, he was in a state of mental derangement.

So far as the motives of the prisoner, or his state of mind are in question, the transactions of these different dates must be considered as one and the same. Pardon me, gentlemen, if I weary you with repetition, I will not say with “vain repetition,”—for so important does this view of the case appear to me, that, unless you find evidence to justify you in convicting the prisoner of an assault with an attempt to murder both the husband and wife on the night of the sixth of January, you would do an outrage to sense and reason in finding him guilty upon the present charge.



Let us inquire then into the character of the former transaction. Its particulars have been related to you by the witnesses. While there was no known cause for the act, you have seen him in the silent watches of the night, rising from his own bed, arming himself with the most deadly weapon, an axe, proceeding to the apartment of his most esteemed friends, and protectors, and while they were reposing in their slumbers, he commences the work of butchery by inflicting blows with the axe indiscriminately upon their heads. The effort apparently brings to him a consciousness of what he has done and is doing. In an agony of distress he alarms the mother of the victims—flies to the neighbors and calls them to their relief—relating all of the transactions of which he is conscious, or which he infers from his own situation and that of the wounded parties. His unremitting attention to them, while under the care of the surgeon;—his anxiety till they were pronounced out of danger from the wounds;—his distress when the subject was adverted to;—all have been proved. Was he previously nurturing in his bosom the dark design of murder? Was he with fiendlike malignity, on that night, executing the demoniac purpose?—and was his apparent affection and kindness all hypocrisy?—and has his whole appearance before you been mere acting? Then the history of the drama—the history of the world has not upon its records the name of an individual of such extraordinary power. In the absence of all proof of inducement, motive or object for the bloody deed, if you were at liberty to indulge in conjecture, what could it supply you? If from any motive, murder was the purpose, why was not the crime consummated? Perhaps he thought it was. Why then did he not retire again to his bed—and leave the whole world open to the suspicion of the guilt, while he would have been the last upon whom it would have rested?

Veteran offenders, long schooled in vice and crime, have been found sufficiently hardened to commit one murder under strong temptation, from mercenary motives. But when has a youth in the innocence of boyhood, educated in the

schools of New England, and the religious and moral discipline of families like those of Mr. Kimball and Mr. Cochran, with the still higher moral influence of associations connected with God's works, as exhibited in the moral scenery of the country, free from the vices and contaminations of men congregated in cities—when, I say, has such a youth been found to change at once, as it were, his whole nature from the habits of quiet, honest industry, to the commission, for the first offense, of the last and blackest on the catalogue of crimes! If he supposed that they had money, or treasures, that he could obtain, when the husband and wife were murdered, his work was but partially done. The mother too must have come within his bloody purpose. You have heard that part of his confession, which assigns the motive for the transactions of that night—"that Mrs. Cochran had offended him by speaking to him concerning his clothes." That a motive for murdering Mrs. Cochran!—for murdering Mrs. Cochran and her husband too! If the assignment of such a motive does not prove a deranged intellect, it surely proves the existence of that malady in him, who could for a moment listen to it, as a motive for such an act.

There has been manifested, not only elsewhere but here on this trial, a strong propensity to encourage the belief, that the prisoner indulged a lawless and wicked attachment to the deceased, and the inquiry will present itself to you, whether such a conjecture finds any confirmation in that tragic scene.

Had such a thought ever been suggested to the deceased? Never! Never! If her pure spirit could now revisit us to declare his innocence, it could not declare it in clearer terms, than was her declaration to Mrs. Robinson, after the transaction of the sixth of January. "Abraham ought not to be blamed," said she, "he would have hurt himself as soon as he would us, if he had known what he was doing."

The miserable, degrading conjecture, then, has no foundation but in the depraved minds that first started it. It

may be said, if the purpose had never been indulged, the design might still be entertained. And was the murder of the object of his wicked desire the way to its accomplishment? Perhaps the death of the husband only was intended, and the blows, by accident, fell upon her. Then you must find him seeking to commend himself to her affections—to share with her the pillow, steeped by his own hand in the lifeblood of her devoted husband—the fond father of her lovely children! What maniacs would such conjectures make of us! Gentlemen, I will not for a moment suppose that you, in your senses can believe the prisoner to have been in his right mind on that night. It is no matter what name is given to the malady with which he is afflicted, whether called somnambulism, momomania, lunacy or insanity, there is no doubt that he ought then to have been put in some place of security, not for any offense he had committed, but for the safety of community; and then the melancholy event which we now deplore would not have happened. That he was not so secured can only be attributed to the general want of information as to the dangerous nature of the disease.

What saved him then from a trial, and conviction, perhaps, but the fact that the persons who were assaulted survived to declare his innocence? What now has put his life in jeopardy, but the fact, that the same malady exhibited in the same form has deprived him of the testimony of her, who, could her voice be heard, would again declare to you that “he was unconscious of what he did.”

Is there a single indication of guilt in the conduct of the prisoner, relating to the whole transaction of the 23d of June, that did not attend that of the 6th of January? He dragged the body of the deceased from the place where she was killed,—but for what purpose? Was it for concealment? The calash and comb were left to mark the spot where the fatal blows were given, and he by the act of removal covers himself with blood—goes directly to the immediate neighborhood of the house—purposely calls the at-

tention of her husband—stands before him in his blood-stained garments—proclaims what he has done, and points out to him the fatal spot. While the alarm is given to the neighbors, and they assemble, he remains near the place; he remains near the place, making no attempt at concealment or escape. His situation and his story is told to you by Mr. Abbot. He found him lying upon the ground, upon his face—he said he had killed Sally—that he had the toothache very bad—sat down upon a root, supposed he fell asleep and killed her. He had then taken off his shirt to hang himself. He described the place where he sat, so that the witness knew it.

Take in connection with this fact, the fact that the report of Avery's trial was in the family, and had, no doubt, been the subject of conversation, a circumstance, as the medical gentlemen tell you, to excite the morbid delusion of an insane mind to acts of violence, and the prisoner's statement of the toothache, which he has uniformly related, and which he could never imagine would have any connection with his guilt or innocence, yet the same testimony assures you that it is a strong proof of that nervous affection which constitutes or occasions the disease, and is often a prelude to it. It may be said to be incredible that he should have instantly fallen asleep. Such an instance is not without numerous cases as precedents, but it is immaterial what he has called that state of mind which was the sleep of reason—or the reign of that delusion which left him no control of himself. If he were conscious what he did, when he did it,—so was the mother, who attempted to snatch her babe from her breast and destroy it in the fire, when she requested her friends to prevent her by force;—so was Hadfield when he fired upon the king;—so was Miss Cornier,<sup>17</sup> when she took

<sup>17</sup> The case of this female produced an uncommon sensation at the time, and it has been publicly asserted, on the best authority, that the reports of her trial led to the commission of several similar crimes.

Harriet Cornier, a female servant, aged 27 years, had been of a cheerful and rather gay disposition, till the month of June, 1825,

the life of an unoffending child—and threw the severed head among the crowd assembled at the door, that they might know, as she said, that she had done it. Yet humanity exults, that the high and intelligent tribunal before which they were arraigned, have pronounced judgments of acquittal. Mr. Abbot further states that the prisoner not only

when she was perceived to become taciturn and melancholy. Not giving satisfaction to her employers, she was discharged from their service, and from that period her melancholy increased to a kind of stupor. She would not disclose to her relations the cause of her mental dejection. One morning in September (1825) she came to the house of a female cousin, pale and agitated, stating that she had just made an attempt to drown herself in the Seine, but was prevented by some persons on the spot. No information could be drawn from her, as to the cause of this rash attempt. On the 27th of October, her friends procured her a place, in the house of Madam Fournier, but there she still presented the same characters of melancholy and despondency.

On the 4th of November, Harriet's mistress went out to walk, and desired the maid to prepare some dinner by a certain hour. She was also desired to procure some cheese at a fruiterer's shop in the neighborhood. The woman who kept this shop had two children, one seven and the other nineteen months old. There existed between the mother of these children and Harriet Cornier neither intimacy, quarrel or source of jealousy. When Harriet went to the shop at times, she always caressed and praised the elder child, named Fanny, and repeated these caresses on the day in question, with more than usual ardor, at the moment when it was evident, she meditated the destruction of the innocent infant. The mother of Fanny informed Harriet that, as the weather was fine, she was going to take a walk with the child, and Harriet begged permission to amuse her while the mother put on some articles of dress for the intended promenade. This was complied with, though reluctantly, by the mother, who had no sooner gone up stairs than Cornier hastened home to her master's house with the child, and laying it on a bed, instantaneously severed its head from its body with a large kitchen knife. This bloody deed was done with such rapidity, that the infant had not time to utter a single cry! On a subsequent examination this infatuated creature declared that, during the murder, she felt no particular emotion—neither a sense of horror, of joy, or of fear. She confessed, however, that, a few minutes after the commission of this frightful act, she did feel a momentary remorse of conscience, which soon subsided. Leaving the decapitated corpse where it was, she first went into the bed-room of her mistress; but soon left that, and repaired to her own chamber, where she remained full two hours. By this time the mother of the infant ar-

made no attempt to escape, but, that having charge of him, he observed, that he slept through the night. Was that deed perpetrated in sane mind, and could a lad of seventeen, with the crime of murder upon his soul, with his

rived, demanding her child. Harriet coolly answered "that the child was dead." The mother at first thought Harriet was in jest, but soon saw something in her countenance which struck a horror through her frame. She rushed past Cornier, and the beheaded corpse of her infant and the bed and floor deluged with blood, presented themselves to her view! At this moment Cornier snatched up the head of the murdered child and tossed it through a window into the street. The father now came running to the house, and the first thing he saw was his child's head, which the wheels of a fiacre had just gone over in the street. All this time the murderer was coolly seated on a chair in the room near the body of the child, and making no attempt to escape. The commissary of police arriving, found her in a state of stupor. She denied no part of the act, but detailed all the circumstances—even the premeditation of the murder, and the arts which she had used to lull the suspicions of the mother, and inveigle from her the devoted victim of her bloody design. On being closely and repeatedly interrogated as to her motives for this terrible act, she either could or would not assign any other than that it was her destiny. When asked for her motive in hurling the head into the street—she answered that it was for the purpose of attracting public attention, and of drawing towards the house a sufficient number of witnesses to prove that she alone was the murderer. Among the spectators which soon collected on the spot, were several medical men, who declared it as their opinion at the inquest which was held, that Cornier was a monomaniac, or insane on some particular point. She continued in a state of stupor, yet answered questions, though slowly, with precision and correctness. On the most minute investigation in her history, no trace of mental alienation could be detected, with the exception of the supposed attempt which Cornier had made to throw herself into the Seine. As a remarkable instance of the imperturbable state of the prisoner's mind, it was ascertained that the menses were flowing at the period of the assassination, and continued to do so, without the slightest interruption from the horrible act which she had just perpetrated, or the fear of any consequences which might result from thence.

In answer to interrogatories before a judge or magistrate, she averred that she was not ill—that she had no cause for chagrin or melancholy—that she had been married about seven years previously but not happily so—that she attempted to drown herself because she was tired of changing her situation so often from one service to another—that the inclination to destroy the child came suddenly upon her, and that she never before had such an inclination—that

hands stained with the life-blood of an amiable female, in the morning of life,—a wife and a mother—could he have laid down and slept? No! had he been educated for Tyburn in the school of highway robbers, or pirates—had he grown grey in the perpetration of deeds of death, he could not in

she experienced no particular emotion in perpetrating the deed, whether of gratification or repugnance—that she felt a momentary horror when the blood was flowing about—she was perfectly conscious of the nature of the act she was committing—that the fear of God did not deter her, because she then believed that there was no God—that she knew homicide deserved death—that she desired death, since life was to her insupportable. When asked finally if she persisted in acknowledging that she committed the murder, she answered steadily in the affirmative.

She was tried for the first time on the 27th of February, 1826. She then appeared in a state of great nervous irritation—her limbs trembling—her eyes fixed—and her intellect in a state of stupor. A few days previously a medical commission consisting of Drs. Esquirol, Adelon and Leveille, was deputed to examine into the moral and physical condition of Harriet Cornier, and after repeated investigations, collectively and separately, they reported their inability to detect any sign or proof of mental alienation in the prisoner. But they properly observed that, in many cases, it is extremely difficult to detect insanity—it requires a long intimacy with the individuals, and numerous opportunities of watching them in all their varying states of temper and disposition. In fine, they reported that, although they were unable to adduce any proof of Cornier's insanity, they could not pronounce her to be free from any aberration of intellect.

This report being conclusive, the Advocate General remanded the prisoner for another session. She was conducted to the Salpetriere, and there subjected to minute observation for three months, when M. Esquirol and his confreres made the following report: namely, "that the most attentive observance of Cornier by themselves and the nurse could not detect any symptom of general or partial insanity. She was plunged in profound melancholy, but this might arise from the circumstances in which she was placed, and which she was perfectly capable of appreciating." But the doctors concluded their report with a wise reservation, that they could not vouch for her perfect sanity, especially if it was proved on trial that the melancholy, taciturnity and other symptoms of a disturbed mind existed previously to the commission of the act for which she was now arraigned. The prisoner was again put on her trial, the 24th of June, 1826. She was seized with a fit of trembling on being led into court, and seemed to pay little or no attention to the act of accusation when read before her. Her answers to the inter-



sane mind have committed that murder, and have driven from his mind, that night, the spectre of the mangled corpse—the weeping relatives—the bereaved husband—the motherless children—the mournful desolation of that house which was his home—and have slept!

Any attempt to raise unfavorable inferences against the prisoner from his conduct, while in jail is attended with sig-

rogatories of the President were brief and in a low voice. Several witnesses deposed, that long before the commission of the crime, the prisoner had expressed herself as tired and disgusted with life—that she would sometimes laugh out loudly and at others cry without any ostensible, or at least, adequate cause. Several physicians were examined, among whom were Esquirol and Adelon, but they could not make up their minds to any certain conclusion on the subject of Cornier's sanity or insanity. There was a great deal of reasoning and ingenuity adduced on both sides—the prosecution and defense—and the decision of the jury was that Harriet Cornier had committed homicide voluntarily but negatived the accusation of premeditation. The punishment was hard labor for life, and to be branded with the letters T. P. She heard the sentence without evincing the slightest degree of emotion.

We shall not follow M. Georget in his numerous remarks on this interesting trial. He properly criticises the Advocate General, who, in an elaborate speech for the prosecution ridiculed the idea of a person being insane on a single point—in fact, he characterized the doctrine of monomania as a chimera—a modern resource for rescuing the guilty from the hands of justice—or an excuse for depriving arbitrarily a citizen of his liberty. It is useless to expend a line in refutation of this absurd assertion of M. Dupin. Unfortunately monomania is no chimera of the imagination—nor is it a modern disease. It has existed in all ages; but formerly it was concealed under the denomination of melancholia, or hypochondriasis of which in fact, it is only a high degree. For this reason, there can be no doubt that thousands have suffered for crimes, or rather fatal actions committed during moments when reason had no dominion over the individual. We think our readers will agree with us that, although the physicians appointed to inspect the moral and physical condition of Harriet Cornier, could not detect any specific symptom or proof of insanity, yet reason and common sense, independently of any medical knowledge, would come to the conclusion from the facts of the case, that this wretched female was insane at the time she committed the fatal act for which she was tried. We agree with Mr. Georget in the following sentiment: “Un acte atroce, si contraire a la nature humaine, commis sans motif, sans interet, sans passion, oppose au caractere naturel d'un individu, est evidemment un acte de demence.” The jury ought to have acquitted her on the plea of insanity—and the punishment should have

nal failure, when the testimony of such a witness as Blaisdell is followed by the highly favorable character so intelligibly given of him by Mrs. Leach.

When you shall have considered all the circumstances of this extraordinary transaction, can you do otherwise than say that it is "an act of atrocity contrary to human nature, against the character of the individual, committed without motive, and of itself evidence of insanity."

Isolated acts of mental derangement, amidst a life apparently rational and regular, may not be familiar to us all, but the cases that have been read to you, and that have been stated by the learned witnesses, who have been examined, shew that such instances are by no means uncommon. They do happen, but did it ever happen that a person in sane mind wilfully murdered his best friend without any motive, real or imaginary? If you were then allowed to rest your verdict upon probabilities merely, an acquittal is justified upon the act itself.

Judges as you are, gentlemen, of the law and the fact, I have felt it my duty to make to you the general remarks which have been submitted in relation to your right to inflict capital punishment—or the right of the Legislature to confer that power upon you. I have adverted to the evils, rather than salutary influences which attend its infliction, that you might not lean to a conviction from a belief that the public good required a sacrifice. The irremedial nature of any error in your judgment against the prisoner, has been suggested, that you might use the more caution—require the more certainty, while feeling "the danger of us—been imprisonment, not hard labor, for life. We are convinced that this would have been the case had the prisoner been tried in an English court.

M. Georget coincides with Esquirol and many other physicians that the reports of these cases of suicide, homicide and infanticide, tend greatly to produce repetitions of the same mournful scenes. Where there is any tendency to monomania the recitals of such events accelerate the march of this disposition, and lead to explosions of a similar kind. In this respect police reports and trials for murder and infanticide, have their disadvantages as well as their advantages.

ing this attribute of divine power without the infallibility that can alone properly direct it." That most mysterious subject the human mind, and the diseases that disturb and derange its operations, could be illustrated only by its history, as recorded by medical authors, or established by the experience of the learned and scientific of the medical faculty. Such aid as these means have afforded we have endeavored to give you. The evidence of the hereditary predisposition to insanity in the family of the prisoner,—the indications of the malady in himself in early childhood—his peaceful character—his exemplary life—the tragic scene of the night of the 6th January—his conduct then—as on the day of death of the deceased, and following it with the considerations in relation to any motive for the crime, or the entire absence of all motive—are now before you. Your verdict of acquittal is now to leave him secured, as the law provides, from hereafter doing harm, by imprisonment,—or your verdict of guilty seals at once his condition for time—for eternity.

In your deliberations, do not lose sight of that principle, which cannot be too often urged, that if you doubt as to guilt, you are bound to acquit. If the evidence preponderate against the prisoner,—yes, even if the balance were greatly against him, yet if a reasonable doubt rest upon your minds—the law says that doubt shall discharge him. A writer upon this subject (McNally) says—"Sir Edward Coke, in favor of life, exhorts juries not to give their verdict against a prisoner without plain, direct and manifest proof of his guilt." . . . "Their duty calls on them, before they pronounce a verdict of condemnation, to ask themselves, whether they are satisfied, beyond the probability of doubt, that he is guilty of the charge alleged against him; . . ." and however strongly you may suspect the prisoner, yet it were better that one hundred guilty persons should escape, than make a precedent by which one innocent man might be found guilty upon such testimony.

I am well aware of the power and eloquence with which the conviction of the prisoner will be urged on the part of

the Government. You may be told that if he escapes the sentence of the law for murder, the commission of the crime may be encouraged, and the blood of future victims will be required at your hands—that perhaps your own children, your own wives, may be sacrificed to your lenity. Gentlemen, let no such appeals stir you to injustice—cruelty—to conviction, without proof and against proof. If you have relatives, friends, whom you would protect from the violence of the assassin, you too are friends, husbands, fathers, to those upon whom, in the Providence of God, the calamity which now afflicts this young man may fall. While every grade of mind from the humblest reasoning faculty to the loftiest power of human intellect has been subject to the paralyzing influence of this malady; while its unseen and noiseless approach is unknown till marked by the ruins it has left—who can feel assurance that within the hour he may not be its victim? And while the thousand new forms and modes in which its effects are exhibited are now daily baffling “the wisdom of the wisest”—who is there may not fear that to such a calamitous visitation of heaven, erring mortals may add the infamy of a public execution upon the gallows.

Gentlemen, I here leave the prisoner and his fate with you. May you render a verdict upon which you may hereafter reflect with satisfaction—a verdict which shall not disturb, with misgivings and regrets, the remainder of life,—which shall not enhance the dread of death, or the awful solemnity of that scene where we all must soon appear before our final Judge.

THE ATTORNEY GENERAL, FOR THE STATE.

*Mr. Sullivan.* This prosecution is deeply interesting to the public as well as the prisoner at the bar. I agree with the counsel on the other side, that in the decision of it no reports, whether in favor of the accused or against him, should have the least weight in your minds; and that your verdict should be formed from the evidence produced on

the trial. It is your duty to examine the evidence with the most critical and anxious attention; lest, on the one hand, an innocent man should be consigned to the grave loaded with disgrace and infamy; or, on the other, lest one of the worst of murderers should go unpunished.

Before I make any remarks upon the evidence it will be necessary for me to examine one or two questions which have been raised and pressed upon your attention.

It has been urged by the counsel for the prisoner that no human government has a right to inflict on a criminal the punishment of death; and much ingenuity has been displayed in attempting to establish the truth of this position.

Although it is not your province, gentlemen, to decide this question, yet the course that has been pursued renders it necessary for me to make some remarks in relation to it; because, if you doubt the right of the Legislature to inflict the punishment of death, you may be led to acquit the prisoner, even if the evidence of his guilt is clear and satisfactory.

It is asserted by some that this method of punishment is both unjust and inexpedient; that it would not be tolerated, were it not for its antiquity, by any free and enlightened people. That it is an error in criminal jurisprudence; and that, like other errors, which have been transmitted from distant times and have grown "heavy with age," it should be at once exploded.

It will scarcely be pretended that a blind and unreflecting veneration for antiquity is a characteristic of the age in which we live. We are far more inclined to innovate than to acquiesce in the opinions of those who have gone before us. Laws, which have been approved by men of the strongest and most powerful minds, and the utility of which has been demonstrated by the experience of ages, have sometimes been condemned as injurious; as relics of ancient barbarism. Many seem to imagine that the very antiquity of an opinion should lead us to suspect its truth. But to reject an opinion because it has been long received; or to condemn

a law merely because it is ancient, discovers very little either of reflection or of practical wisdom. Shall the trial by Jury, that best safeguard of our property, our reputation, our liberties, and our lives, be abolished because it has existed for centuries? If antiquity has sometimes led us to adopt erroneous opinions; these are few and inconsiderable, compared with the many salutary and invaluable lessons which its wisdom has taught us.

It is difficult for us to examine the position laid down by the counsel for the prisoner with unprejudiced minds. When we find that the punishment of death is frequently inflicted by other governments on those who are guilty of very trifling offenses, we sympathize with the sufferers; we regard the punishment as unjustifiably severe; and condemn the law that imposes it. With feelings thus excited, we are easily persuaded that the punishment of death can in no case be justly inflicted.

But, in truth, the arguments which are urged to prove that government has no right to inflict the punishment of death, are entitled to very little weight; they are rather specious than solid. The principal argument is the following: that government can possess no rights but those that are conferred upon it by its subjects; that a man has no right to take his own life; and, of course, that he cannot transfer that right to the government.

If a murder is committed, shall the offender go unpunished? It is answered, no! let him be imprisoned during his life; that in this situation he can do no further mischief; that society will be safe.

It will be, at once, perceived by you, gentlemen, that the same mode of reasoning, by which it is attempted to be proved, that government cannot punish a criminal by death, will equally prove that it cannot punish him by imprisonment for life. It might be said that a man has no right to cut himself off from society; to shut himself up in a prison; and make himself a subject of punishment during his life; that if he has not this right he cannot transfer it to govern-

ment; that government, therefore, does not possess this right. It is apparent that by the law of nature man is bound to seek not only his preservation, but his happiness; to secure not only his being, but his well being. To destroy his own happiness by shutting himself up in a prison and punishing himself during life would be as truly a violation of the duty imposed on him by his Creator as to put an end to his existence. By pursuing the mode of reasoning, which has been adopted to show that government has no right to inflict the punishment of death, it might be proved, with equal plausibility, that it has no right to inflict any punishment whatever.

It is unquestionably true that there are certain rights which are justly claimed and justly exercised by every government and which belong to it, not by virtue of any particular compact, transferring those rights, but from the very nature and necessity of government.

Few arguments will be necessary to convince you gentlemen that the allwise and benevolent Creator of man intended that he should live in a state of society. Besides a sense of weakness and a desire of personal security, which urge him to enter into the social state, there is implanted in him an instinctive love of society, which constantly allures him to it. Without society the best and noblest powers bestowed by God on man would have been almost entirely useless. In a state of solitary and savage independence the various faculties of the human mind could never have been developed; the amiable and benevolent affections of the heart could never have been called into exercise. It may then be safely affirmed that the existence of society, which is essential to human happiness, was designed by that Being whose goodness is infinite.

It is equally certain that the Creator of man intended that he should live under a government of some sort, since, without government, society cannot exist.

The right of self-preservation belongs to every society and to every government, as well as to every individual;



not from any contract transferring that right but from the very nature of these institutions—from the necessity of uniting in society and of living under some form of government to prevent its dissolution.

If a number of individuals rebel against the government, that protects them ; if they endeavor to overturn it ; may not the government employ force against them ? May it not destroy the lives of the rebels ? No one who reflects on the subject can doubt it. Government derives the right of taking the lives of its rebellious subjects from the principle of self-preservation and from the necessity of protecting that society, of which it is constituted the guardian. Without this right no government can stand ; whatever may be its form, it must necessarily fall, and society must fall with it.

It may be regarded as a political axiom that the very existence of every lawful government implies a right on the part of that government, to do every act necessary, not only for its own preservation, but for the preservation of the society whose interests are intrusted to its care. As he who commits murder or treason may be justly considered as a public enemy—doing such deeds of wickedness as to tend to the overthrow of the government and the dissolution of society—his life may be rightfully taken by the government, both from the necessity of preserving itself, and that of guarding the public safety.

It has been said that imprisonment for life would prevent the commission of dangerous and aggravated crimes as effectually as the death of the offender. This is wholly incorrect, it would not operate with equal power to prevent the perpetration of the first crime that condemns the criminal to prison for life ; and it is perfectly clear that it would not have the least tendency to prevent the commission of subsequent crimes, however atrocious they might be. It would place the murderer in a situation to repeat his murders with impunity. If a murderer is committed to the State Prison for life, what assurance can there be that he will not destroy the lives of his fellow prisoners ? What

will restrain him? Will the principles of religion or morality do it? His past conduct shows that no religious or moral principles have the least influence over him. Will the feelings of humanity prevent? The barbarous crime he has committed clearly proves that such feelings are strangers to his heart. Will the fear of punishment from any human tribunal deter him? He has, on the principle contended for, received the highest punishment that any human government has a right to inflict. If a man perpetrate murder, when all the terrors of imprisonment for life are before his eyes, will he forbear to perpetrate it when no punishment can be inflicted on him if he does? The voice of reason and of justice as well as the feelings of humanity forbid that government should send a murderer among the convicts in the State Prison—prepared, as he must be, for the perpetration of the most atrocious crimes—and with a perfect knowledge that he can receive no further punishment whatever murders he may commit. Government has no more right to send among them such a hardened and dangerous offender than to let loose upon them the most ferocious and destructive animal. The convicts in the State Prison are under the protection of government as much as others; and their lives ought not to be at the mercy of one who can receive no punishment if he destroys them.

It may be said that the murderer may be confined during his life in a cell, so that none may be injured by his violence. They who are led by their humanity to desire that the punishment of death may be abolished would do well to consider, whether this would not rather increase than diminish the amount of human suffering. Would not he who suffers the momentary pangs of death endure far less than he who is compelled to drag out years of wretchedness in the cell of a prison?

Let it not be supposed, because there is more of suffering during a protracted life in the cell of a prison than in the pains of death, that such lengthened suffering would have more power to prevent the commission of murder than ever

death itself; it would have less, because it is far less dreaded. It is scarcely possible for the most hardened offender to think seriously of dying without being filled with terror. It is not the agonies of death that he so greatly fears, but it is the awful retribution beyond the grave. If this period of retribution is closely connected in the mind of every individual with the commission of murder; if he knows it must soon follow the atrocious deed, he will be deterred from the perpetration of it far more effectually than by any apprehension of being confined for life in the cell of a prison.

It has been said that the life of the murderer should be spared that he may have an opportunity of repenting of his crimes.

Does experience prove that confinement in the State Prison will lead men to reflect on their crimes and to repent of them. It shows very clearly that the State Prison is not the place in which the vicious are reclaimed; that its tenants, instead of repenting become more hardened in wickedness. Real penitence necessarily leads to a reformation of the life. But of those who have been committed to the State Prison, how small is the number whose lives have been reformed? Instances have frequently occurred in which individuals who have been confined for years in the State Prison, upon being discharged, have been guilty of new crimes and have again been committed. He who is confined to prison for life, like most others who expect to die a natural death, will postpone repentance to a distant day. He will easily persuade himself that for such a business the close of life will be the most proper season. By indulging this spirit of procrastination he daily becomes more hardened in sin and in all probability at the end of his existence the work of repentance will not even have been commenced. But he who has been condemned to die and who knows that in the course of a few days he must appear at the tribunal of his Creator to receive his sentence for eternity, will be much more likely to reflect deeply and solemnly on the sins of his past life, and to feel the necessity of immediate repentance.

But enlightened as we are, gentlemen, by the word of inspiration, we cannot consider the question that has been raised as a doubtful one. That Being, who has a sovereign right to the lives of all his creatures, has not only permitted but commanded that the murderer should be put to death. It is written, "Whoso sheddeth man's blood by man shall his blood be shed." This, it is said, is not a command, but a prophecy. By comparing the passage cited with other parts of Scripture, it will at once be seen that it is a command. God said to the Israelites, "Ye shall take no satisfaction for the life of a murderer, but he shall surely be put to death." Is this too a prophecy? Did the Israelites so consider it? They regarded it as a command, and in no instance did they depart from it. The reason of this command is clearly explained to them in the following words: "for blood defileth the land and the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it."

The temples and altars, erected to the gods of the Heathen, were anciently a sanctuary—a protection to those who committed wilful murder. But no temple—no altar—dedicated to the only living and true God, afforded any protection to him, who was guilty of this detestable crime. Sacred as the temple and the altar unquestionably were, the murderer was dragged from them and put to death.

But, gentlemen, it is further urged that if the punishment of death could be rightfully inflicted, in any case, the exercise of that right would be inexpedient.

Whether it is expedient or inexpedient to establish a particular law, it belongs to the legislature and not to a jury, to determine.

It has been confidently asserted, that in those countries in which the punishment of death has been abolished, the number of murders has decreased. But has the experiment been fairly made in any country? During the reigns of two of the sovereigns of Russia, this mode of punishment was prohibited. But it should be remembered that while it was abolished

in name, it existed in fact. It is well known that during this nominal abolition, thousands of criminals perished under the punishment of the knout or in the mines of Siberia. Every Russian subject knew as well that he must suffer the loss of life, if he committed an aggravated crime, as if the punishment of death had been expressly denounced against it. That this was a fair experiment will scarcely be pretended.

In the year 1786, the Duke of Tuscany, issued an edict abolishing the punishment of death throughout his dominions. In the course of a few years afterward the arms of France suspended the operation of the law and it is uncertain whether it has, at any time since, been in operation. From an experiment so short, even the friends of that measure will admit that it is impossible to determine whether the law would in its consequences, have proved beneficial or injurious to that country.

There is a moral distinction in crimes, which should always be marked by a difference in their punishment. To punish those of a higher and those of a lower grade with the same severity, would be both unjust and impolitic. In the crimes of murder and highway robbery, for example, there are different degrees of malignity; and every one will perceive that the murderer deserves a severer punishment than the robber. To annex precisely the same punishment to these crimes would be dangerous to society—it would lead inevitably to the destruction of human life.

If the Legislature of this State should abolish the penalty of death, so that murder and robbery should receive the same punishment, that is, imprisonment for life; he, who should rob, would always murder the individual robbed; because he would receive no greater punishment in consequence of the murder; and by the commission of it, he would lessen the chances of detection. But when a severer punishment awaits the robber, if he adds murder to robbery, it will restrain him from the perpetration of it. Such is the conclusion to which reason, unaided by experience, would conduct us, but experience proves this conclusion to be just.

It is remarked by a celebrated writer, that in China, those who add murder to robbery, are punished with more severity than those who do not; and that is owing to this difference, that although they rob in China, they never murder; that in Russia, on the other hand, where the punishment of murder and robbery is the same, robbers always murder.

It is easy to see that in other cases where murder and other crimes inferior to it in degree receive the same punishment, the same fatal consequence must follow. Where, for example, rape—and rape attended with murder—are punished with equal severity, it is clear that the life of the unfortunate female would always be taken.

It may be said that he who adds murder to robbery, rape, or other crime that he may commit, should be punished by being confined in a cell for a certain period, in addition to confinement to hard labor for life.

If the confinement in a cell should be for a short period, it would not prevent the offender from committing murder; if it should be for a long period, it will, as I have already attempted to prove, increase instead of lessening the amount of human suffering.

The welfare of the community certainly requires that the punishment of death should be inflicted on the murderer. The government ought not to be solicitous to save from an untimely end the enemies of the public—those who have forfeited their lives by their crimes—while they are regardless of the welfare of every other portion of the community. The care and vigilance of every government should be constantly employed in providing for the safety and in promoting the happiness of the moral and useful part of society. It is, undoubtedly, true, that where there is a great disproportion between a particular crime and the punishment annexed to it, the infliction of the punishment is injurious to the community. Public sentiment disapproves and condemns it as too severe. The public can never be made to believe that to shoot a swan—to break down the mound of a fish-pond—or to steal goods above the value of twelve pence—are crimes that deserve the pun-

ishment of death. In such cases the offenders feel that the penalty of these laws is unjust; they know that the public sympathize with them; and they meet their fate with fortitude. The indignation of the community is excited against these laws and declares them to be inhuman and oppressive. But when public sentiment approves the penalty of the law, and clearly sees its fitness for the crime, it cannot be inexpedient to inflict that penalty.

That murder should be punished with death seems to be a sentiment inscribed on the human heart. It has been the sentiment of all nations, civilized and savage, in every age, and in every country. The conscience of the murderer himself acknowledges the justice of the punishment, he is self-judged and self-doomed to die. Instances are common in which a man, convicted of murder, persists in asserting his innocence to his latest hour; but no murderer has ever been heard to complain that death is a punishment too severe for the crime of murder.

We come now, gentlemen, to a consideration of the solemn and deeply interesting question, whether the prisoner at the bar is guilty of the crime with which he is charged.

It must be presumed, it is said, that the prisoner is innocent; and, if he destroyed the life of the deceased, that he did it without malice.

That the law presumes every man accused of a crime to be innocent; and that it is the duty of government to remove this presumption before the accused can be convicted, is readily admitted. But when a person is indicted for murder, and the law declares that he shall be presumed to be innocent, the meaning is plainly and obviously this, that he shall be presumed innocent of the killing of the deceased; but the authorities, which have been read, are express, that if the fact of killing be proved, the presumption is, that such killing was malicious; and that the circumstances of accident, necessity, or infirmity, must be established by the prisoner.

That the deceased came to her end in consequence of blows that had been given to her by some person cannot be doubted.



Doctor Sargent says that between 11 and 12 o'clock, on the 23d of June, 1833, he saw the body of Mrs. Cochran, and examined the wounds inflicted on her; that she had received three blows on her head, one of which had fractured her skull; and that the blows were the cause of her death. Dr. Pillsbury says he assisted in examining the wounds on the body of the deceased and has no doubt that she died in consequence of those wounds.

The evidence is, also, perfectly clear that the blows which occasioned the death of Mrs. Cochran were given by the prisoner. Chauncey Cochran, the husband of the deceased, says that on Sunday, the 23d of June, 1833, about 9 o'clock, the prisoner passed through the room in which he was sitting into a back room where his wife was; he soon came back and told the witness that his wife wanted him to go into the field and pick strawberries. The witness was reading Avery's trial, and declined going. The prisoner then said that he would go with her; that they would go into James Cochran's pasture. This pasture is in sight of the road and within thirty rods of the house of the witness, and within the same distance of two or three other houses. He says that in about an hour and a half after the prisoner and the deceased had left his house, his mother asked him what noise she heard; he went to the barn and found the prisoner sitting on the sill of a shed at the further end of the barn. The prisoner said he had struck Sally with a stake and had killed her; that he had the toothache and sat down by a stump and knew nothing until he had killed her. The witness asked where she was; the prisoner said down in the Brook-field. They then went to the place where the deceased was killed; the prisoner pointed to the body, which had been dragged behind some bushes.

Here you have the voluntary confession of the prisoner that he took the life of the deceased. But without this confession, the evidence is too strong to leave even the shadow of a doubt respecting his guilt. The prisoner and the deceased left the house of the witness together; in less than two hours after, she was found dead in consequence of wounds inflicted on her.

Who but the prisoner could have inflicted those wounds? It has not been proved—it has not even been intimated—that any other person was with her who could have perpetrated the barbarous deed. The clothes of the prisoner testify against him; they were stained with the blood of the deceased. The prisoner conducted the witness to the place where the murder was committed, and pointed out the spot where the body was concealed. These circumstances prove so conclusively the guilt of the accused that I shall say nothing at present as to the confessions made by him after his confinement in prison.

The principal ground on which the counsel for the prisoner rest his defense, is, that at the time when he took the life of the deceased, if, in fact, he did take it, he was insane; that he knew not what he did.

If this be true, gentlemen, it would be most inhuman to convict him. But what is the proof of his insanity? The mind is invisible; it is not perceptible by any of our senses. We can never know the state of another's mind but by his words and actions. It is from these alone that we can ever ascertain whether a person is sane or insane. No mark—no symptom of derangement was discoverable in the prisoner, neither before or at the time, or after the perpetration of the murder.

It has been urged that a person may become deranged, and the first manifestation of that derangement may be the doing of some act of violence to another; and that the very doing of the act is proof of the derangement. Surely a single, an insulated act of violence, however outrageous it may be, can never be considered as proof of derangement. If it be, the greater the violence the more aggravated the circumstances attending it—the stronger is the proof of the fact. The destruction of human life, then, affords perfect evidence of insanity.

We have hitherto believed that to take the life of a human being without just cause, afforded evidence of great and uncommon depravity of heart, but none of insanity. We have always looked upon the murderer with feelings of abhor-

rence; and we have regarded with tenfold abhorrence the child who has imbrued his hands in the blood of his parent. But if the taking of human life is of itself proof of insanity, the murderer and the parricide are lost in the unhappy maniac, and our feelings of abhorrence should give place to those of pity. All considerate and intelligent men have believed that a person may commit murder, or treason, or any other crime, and still have the possession of his reason.

In determining when a man destroys the life of another whether he is sane or insane, by what shall we be guided? Shall we follow the idle theories, the airy speculations of visionary writers, or the plain principles of reason and common sense? We can be at no loss to decide.

The rule suggested by reason and common sense is plain and intelligible; it cannot mislead us. It is this: If we find that a man converses on all occasions rationally; that he acts rationally in all things except the commission of the crime with which he is charged, we must consider him as a man of sound mind, and the proper subject of legal punishment. This is the only practical rule, the only rule calculated to secure the safety and welfare of society.

If the killing of another is of itself proof of insanity, without any previous or subsequent act indicating an unsound state of mind, no man could ever be punished for murder. The same evidence that would prove the fact of killing would equally prove the insanity and of course, innocence of the accused.

It is perfectly clear that it can never be determined by a single act whether a man is deranged or not. He may commit murder, or robbery, or any other crime, and still have the possession of his reason. It is only from a series of acts that the real state of the mind can be ascertained. Dr. Wyman, and Dr. Perry, whose attention and studies for several years past have been particularly directed to this subject, and on whose opinions great reliance should be placed, say that a person may become suddenly deranged, and that such derangement may first discover itself by the commission of some act

of violence; but they further say, that the act of violence will always be followed by other acts clearly showing the insanity of the party. It is not, then, the act of violence alone, but that, connected with other acts which follow, that shows whether the person committing it, is deranged or not. Although insanity may sometimes overspread the mind with a thick cloud and sudden darkness, yet that darkness is never short and momentary in its duration. Allowing the individual affected by it just time enough to destroy the life of a fellow being, or to do some other act of violence, and then passing instantly away; the darkness often continues through the life of the maniac, and always for several days from the time of its commencement. Doctor Wyman says the shortest period he ever knew insanity to last was one week. Doctor Perry says the shortest period he ever knew it to continue was five days.

The physicians testify that insanity commonly comes on gradually, and it appears from their evidence that when it comes suddenly there is always a period in which the individual affected will do such acts as to leave no doubt of his insanity.

If the prisoner was really deranged and his derangement came on gradually, it would be in the power of his counsel to prove some acts indicative of his approaching malady before he killed the deceased. But they have not done it. If his derangement was sudden you have a right to require evidence that his conduct showed him to be deranged after the deed was done. Have they proved a single act done, or a single expression used by the prisoner after the murder was committed that can have the least weight in establishing the fact of his insanity? I certainly know of none.

Several witnesses have been called on the part of the prisoner, but no one of them tells you that he ever thought him deranged.

Many witnesses have been examined in behalf of Government who have known the prisoner from his cradle; some of them have lived in his neighborhood and have often worked

with him; others have resided in the same family and they all declare that they never saw anything in his conduct which led them to suspect that he was insane.

It is said that Abraham Prescott, the grandfather of the prisoner, was insane; that insanity is hereditary, and that this is a strong circumstance to prove the insanity of the prisoner. The derangement of Abraham Prescott, if it would have the least tendency to prove the derangement of the prisoner, should be established by the clearest, the most unquestionable evidence. It is unreasonable for the prisoner to request you to form the slightest presumption that he was deranged on the ground of his grandfather's derangement, while he leaves it in perfect uncertainty whether his grandfather was deranged or not.

The witnesses who have been called to prove the derangement of Abraham Prescott have not established the fact.

Hezekiah Blake says he was acquainted with Abraham Prescott, who has been dead forty-five years—he lived within a mile and a half of him—he was deranged. Upon being cross-examined this witness said that although he saw Prescott often, he never saw him when he was deranged, but he had frequently heard that he was so. Mary Poor knew Prescott when she was young—lived near him—he was more talkative at sometimes than at others she never saw him when he was deranged, but heard his friends say he was. Jonathan Fellows was acquainted with Abraham Prescott and lived within a mile and a half of him till he died—he used to see him three or four times a year. It was reported that he was deranged, but he never saw him when he was so. This evidence is very far from establishing the fact that Abraham Prescott was insane; it rather proves the reverse. The report that he was insane should have no weight in your minds, because, if this was the fact, it could be proved by some one who actually knew it. The three last witnesses whose testimony I have briefly stated, lived near to Abraham Prescott and never saw him when he was deranged. Is it not probable if he had been insane, that some one of these witnesses would have seen

him during his insanity? But Chase Prescott, a son of Abraham Prescott, testifies positively that his father was insane. He states that he lived with him till he was twenty-two years old, and then left him. That his father was deranged several times while he lived with him. He says he took his father into the field to cut stalks in order to divert his mind, but he did not understand the business and cut off the ears with the stalks. This witness is the father of the prisoner. Besides this circumstance, which will undoubtedly lessen the weight of his testimony, there are others which will satisfy you that he ought not to be credited. He has not been uniform in his story. The statement he has made to you in relation to the derangement of his father is the reverse of that which he has made to others. William Knox says he was present when Mr. Peaslee asked Chase Prescott, the witness, whether insanity did not run in the blood of his family. Chase said he did not know that it did—he never knew any of the family to be deranged.

Norris Cochran testifies that on another occasion he heard Chase Prescott say he never knew any of the Prescott family to be crazy. If Abraham Prescott had been several times deranged as Chase Prescott now represents, would he have said he never knew one of the family to be deranged? When he made these declarations he did not know that it would be favorable to the prisoner to state that his father was insane. He had then no motive to misrepresent the fact. There is one circumstance to which I would call your attention, which is conclusive to show that Abraham Prescott never was deranged.

It appears from the testimony in the case that Abraham Prescott left twelve children, nine sons and three daughters. If he was deranged, all his children must have known it. Why is only one of all these children produced to establish this fact, and that one the father of the prisoner? If any of the other children would have testified that Abraham Prescott was deranged they would have been called for that purpose. The counsel on the other side have undertaken to show

that Mrs. Blake, a daughter of Abraham Prescott, was insane. But what could this, if true, avail the prisoner? No presumption can arise that a nephew is insane because his aunt was. If it had been proved that Mrs. Blake was deranged, you must still have gone back and inquired as to the sanity of Abraham Prescott from whom the prisoner is descended. They have examined several witnesses to show that she was deranged, but do not establish the fact.

Hannah Huntoon says she lived with Mrs. Blake forty years ago. She was sometimes dull and melancholy—was called deranged. There were no difficulties in the family while she lived there—her husband said she was out—she heard that Mrs. Blake was jealous of him.

Mary Rowe went to live with Mrs. Blake when she was about twelve years old, and lived with her two-thirds of the time for twelve years. Mrs. Blake was sometimes cheerful and sometimes melancholy—found fault with her husband for going after other women. She thought her deranged. Chase Prescott and Mary Prescott say that Mrs. Blake was insane. I shall make no remarks upon the testimony of these two witnesses at this time, as I shall have occasion to speak of it hereafter. That Mrs. Blake was sometimes melancholy there can be no doubt; and the cause of her melancholy is sufficiently obvious. She entertained suspicions of the fidelity of her husband. These suspicions, whether well or ill-founded, produced a degree of melancholy, which some of the witnesses mistook for insanity.

Doctor William Graves says he lived in the neighborhood of Mrs. Blake for nineteen years, and was often at her house. He was her family physician—he never knew nor heard that she was deranged. Benning W. Sanborn lived between twenty and twenty-five years within a mile of Mrs. Blake. He saw her often, she was not deranged. There were troubles in the family, but he does not know the cause. Jeremiah Bachelder lived within thirty or thirty-five rods of Mrs. Blake for twenty-eight years; he says he never knew nor heard that she was insane. Judge Burgin and Squire Evans testify that they



lived at a distance from Mrs. Blake, but were well acquainted with her. That her husband kept a public house in Deerfield and as they had occasion to travel that way, they used to call frequently at his house. They never thought nor heard that Mrs. Blake was deranged.

It is further said that Mrs. Hodgson, a half-sister of the prisoner, was insane. Chase Prescott and Mary Prescott testified that Mrs. Hodgson was always deranged when she was sick; that she was once taken suddenly ill at their house and a physician was sent for; that when she went home she refused to ride with her husband or to nurse her child. When Mrs. Hodgdon was taken sick at the house of Chase Prescott Mrs. Prescott says it took several persons to hold her, and she used medicines for a disorder in her head. These witnesses are the parents of the prisoner. In weighing their testimony this relation must not be forgotten. I know nothing against their moral character; but where is the parent whose virtue would not be severely tried by being placed in a situation like theirs? When a child is put on trial for his life and his parents are called as witnesses, how strong is their temptation to discolor and to misrepresent facts in order to save him from an untimely and disgraceful death!

Let us consider, in the first place, what weight should be allowed to the testimony of Chase Prescott. The witness stated at one time in the hearing of William Knox, and at another in the hearing of Norris Cochran, that he never knew one of the Prescott family to be deranged. These statements were made since the death of Mrs. Cochran. He now tells you that his father—his sister, Mrs. Blake—and his daughter, Mrs. Hodgdon, were all deranged. These declarations, made in the hearing of Knox and Cochran, were not hasty and inconsiderate ones; they were made in both instances when the attention of the witness was called particularly to the subject of insanity in his own family; and in one of them when he was asked whether insanity ran in the blood of his family. Which of these statements is to be credited? That which was made when he had no motive to misrepresent, not supposing it

would be of any importance to say that these relatives were deranged; or that which was made to you when he believed it was important to say that they were deranged, and hoped by that statement to save the life of his child? If it be true, as has been testified, that when Mrs. Hodgdon was taken sick at the house of Chase Prescott, she was deranged and it took several persons to hold her, why are none of those persons present to prove the fact of her derangement? If it be true that a physician was sent for on that occasion and that he gave her medicine for a disorder in her head, why has not that physician been summoned as a witness? Would the proof of the derangement of Mrs. Hodgdon have rested entirely on the testimony of the parent of the prisoner, if other testimony could have been produced?

We come now to a consideration of the testimony of Mary Prescott. She says that when the prisoner was about six weeks old he was sick; his head increased very much in size—that Dr. Graves was sent for, and pronounced his case hopeless; that Dr. Graves told her if the child lived he would be deranged. Dr. Graves tells you that Mrs. Prescott must be mistaken—the child could not have been so bad as she represents. He says he finds by his books that the first time he visited the child was the 15th of March, 1815—the next time the 15th of April—he did not see him again till the 29th of August. He visited him once or twice more in September or October following. He says he is confident he should have visited him oftener if he had been very bad. He further declares that he has no recollection of ever telling Mrs. Prescott that the child would be deranged.

There can be but very little doubt that Mrs. Prescott is incorrect in her testimony.

It would be a waste of time to examine the evidence in relation to the alleged insanity of Benjamin Prescott, Marston Prescott and Moses Prescott, because no one of them was a descendant of Abraham Prescott. Benjamin was a nephew, Marston was also a nephew, and Moses was a son of Marston. If it had been proved by the clearest evidence that Abraham

Prescott was deranged, it would furnish no evidence of the derangement of the prisoner. No one will pretend, if a particular individual is insane, that all his descendants must be in the same unhappy state. It must be proved, then, in a satisfactory manner, that there were some marks, some symptoms, clearly indicating derangement in the prisoner before you can believe that he was deranged. It has been contended with much earnestness that the insanity of the grandfather connected with the fact that the prisoner killed the deceased, furnishes sufficient evidence of his insanity. If this be true, then if any other descendant of Abraham Prescott had destroyed the life of any person, he must have been accounted insane as well as the prisoner. It appears from the testimony that Abraham Prescott left nine sons and three daughters. His descendants are very numerous, and each one of them, if he should commit murder, might set up the same defense that is relied on in this case. Are the descendants of Abraham Prescott let loose upon society to murder whom they please with impunity? When any one of them is indicted for murder, shall he prove that his father or grandfather was insane, and shall that fact, connected with the killing, prove him insane? If these facts are evidence of insanity in the case before you, they would be evidence in the case of every individual who is descended from Abraham Prescott.

It has been stated by some of the physicians that insanity is hereditary; that it may lie dormant in one generation and appear in the next. Through how many generations may this predisposition to insanity extend? Does it cease with the second or third generation, or may it extend to the fourth or the tenth? If this predisposition furnishes any evidence of derangement, how remote must be the person who kills another from his insane ancestor before he is denied the privilege of proving the insanity of that ancestor as evidence of his own? The truth is that the derangement of one man is, in no case, evidence of the derangement of another. If a deranged father transmits to his children a predisposition to this disease, this circumstance affords no evidence of its actual ex-

istence. The insanity of every individual must be proved by such acts and such symptoms, as usually designate this malady of the mind.

It appears from the testimony of the physicians, as well as from the books that have been read to you, that there is a delusion resting on the mind of every insane man, which reason cannot remove. To this general rule the case of frenzy or raving madness forms an exception. Here no delusion is perceived to occupy the mind of the maniac. But in every other case delusion is the great mark by which insanity is known. You will remember that the counsel have not asserted nor even intimated that there was anything of frenzy or raving madness in the case of the prisoner. I will refer to one or two cases only from the many that have been stated, to prove the existence of this delusion.

A gentleman in the neighborhood of Boston believed that people had attacked him with chlorine gas as he passed along the streets, and had thrown some of it into his chamber; that it produced pains in his head. He fastened down his windows and caulked them and kept cotton in his nose and ears. His friends endeavored to convince him that no such attack had ever been made upon him, but their efforts were vain—the delusion could not be removed.

A female patient believed that she was actually dead and several times requested her physician to have her buried.

In every case of insanity, with the single exception mentioned, there is this false belief—this strange delusion fixed upon the mind. It is soon perceived by others because it occupies almost exclusively the thoughts of the insane man; and as he believes it to be a reality, he does not seek to conceal it. In order to establish the actual derangement of the prisoner, it is necessary to prove to you that he labored under some delusion.

Where is the evidence that there was any delusion, on any subject, at any time, resting on the mind of the prisoner? Many witnesses have been examined on the part of the accused, as well as on the part of the government, and not one

of them tells you that he ever discovered any delusion resting on his mind. When questioned on the subject, they all declare that they never perceived any mark of derangement about him at any time.

Notwithstanding this strong and conclusive evidence that the prisoner was of a sound mind, various circumstances have been mentioned as proofs of his derangement. It is said that he has been in the habit of walking in his sleep, and that somnambulism is allied to insanity. But the physician who states this, says that it is no more allied to insanity than dreaming is. If it had been proved, then, that the prisoner was in the habit of walking in his sleep, it could have had but very little weight in establishing the fact of his derangement. But it has not been proved.

Chase Prescott and Mary Prescott say that the prisoner, when a child, used to get up and walk in his sleep. These witnesses are not to be credited.

Thomas Kimball testifies that the prisoner lived with him eighteen months, and that he never knew him to walk in his sleep during that time. Chauncy Cochran says he never knew him to walk in his sleep during the time he lived with him, which was three years. He further states that in the winter of 1833, when he and his wife were wounded by the prisoner, Chase Prescott and Mary Prescott both told him that they never knew the prisoner to get up in his sleep before. From this evidence it is very clear that the prisoner was not in the habit of walking in his sleep.

It has been suggested that a short time before this murder took place, the prisoner was employed about heavy work, and that this produced insanity. Dr. Wyman says that any severe muscular efforts would be likely to produce insanity in a person predisposed to the disease. There is not the slightest evidence that the prisoner had been employed about any hard work or had made any great muscular efforts previous to the murder. It appears from the testimony of Chauncy Cochran that he had been engaged in making wall only two days during the whole season; that the week before the mur-

der he had worked on the highway most of the time, and that on Saturday, the day before the murder, he did light work about the house. Timothy Robinson says the prisoner did chores about the house of Mr. Cochran the day before the murder.

But the circumstance on which the counsel for the prisoner chiefly rely to prove his insanity is this: That in January, 1833, he struck Chauncy Cochran and his wife with an axe; that he had always lived on good terms with them, and could have had no motive to do them an injury. From this they would have you infer that he was insane.

It would be extremely dangerous for a jury to say that where a person commits a crime, he must be insane, if they can discover no motive for his conduct. The criminal, without doubt, must always have a motive for his conduct, but he may conceal it from the world. In this case there was a motive—he was actuated by a spirit of revenge.

George C. Thompson says that in September, 1833, he heard Mr. Fowler ask the prisoner why he struck Chauncy Cochran and his wife in January, 1833; he answered that Mrs. Cochran scolded at him, and told him if he went out so much in the night, and tore and dirted his clothes in such a manner he would be no more respected than his brothers. He said he did not like her for that, and always remembered it. Such a circumstance as that mentioned by the prisoner would, to most people, appear very slight and would soon be forgotten by them. But an ill-tempered and revengeful man might consider himself as very badly treated, and might be induced to seek for vengeance. The prisoner did not consider it as trivial; he said he never liked her for that, and that he always remembered it. He gave no reason for his dislike of Chauncy Cochran, but you can learn it from the evidence.

Chauncy Cochran says that the prisoner used to beat his cattle very much; that he scolded at him for it several times, and that the prisoner appeared to be cross. He disliked Cochran because he scolded at him, and sought revenge. But if it

were not in your power to assign any motive for his conduct, you would not be justified in pronouncing him insane.

It appears from the testimony of Chauncey Cochran and that of other witnesses that the prisoner has uniformly declared that the prisoner has uniformly declared that he was asleep when he committed the violence in January, 1833. If he was asleep you need assign no motive for his conduct; it would be absurd to be making inquiries about the motives that influenced the conduct of a sleeping man.

If he was not asleep, he practised the greatest deception; he invented the story of his getting up and doing the violence in his sleep, in order to save himself from merited punishment. Is it possible to believe that a deranged man would commit an act of violence upon the person of another and then say he was asleep, to prevent his being punished? The law is clear that when insanity is relied on as a defense, it must be shown that the criminal was incapable of distinguishing between right and wrong; and if he is indicted for murder that he did not know that murder was a crime? When a deranged man commits an act of violence, he does not know that he has done wrong. If the prisoner had not known perfectly that he had committed a wrongful act, he would not have feigned the story of his being asleep. This affords satisfactory evidence that he was not deranged.

There is another very strong circumstance to show that the prisoner was not deranged. It appears from the evidence that Chauncey Cochran and his wife, and all the neighbors, believed that the prisoner was asleep. This fact proves conclusively that up to January, 1833, he had discovered no symptom of derangement. If he had done any act indicating insanity, people would have said he was deranged when he did the violence; they would not have believed that he was asleep.

But if he was insane in January, 1833, it would not be evidence that he was in the same state in the June following. Does the derangement of a person at a particular time prove his derangement five months afterward without



his discovering, by a single act or a single expression, any unsoundness of mind between these periods? It is not pretended that between these times there was any act or any expression indicating insanity. If without proof of any such act or expression it would be evidence of derangement after five months, it would after five years or twenty years.

Doctor Cutter says he has looked attentively at the prisoner. He finds that his eyes are dull and their motion slow. They denote an approximation to idiocy.

Nine or ten witnesses on the part of the Government have been examined as to the appearance of the prisoner; they all say they have known him for many years; and some of them that they have known him from his childhood. They tell you that his eyes were always dull and heavy and their motion slow; that their appearance is the same now as it always has been. He is so far from approximating to a state of idiocy that, according to the testimony of these witnesses, he always has been and still is a person of good understanding. You will recollect that no witness called in behalf of the prisoner contradicts this evidence.

It is said that the derangement of the prisoner was caused by Avery's trial. If the reading of this trial could have produced insanity, it should have been clearly proved to you that he read it. Mr. Cochran says he borrowed the book; he had not read it when the prisoner and the deceased left his house; he was reading it at that very time. If the prisoner had read it, the counsel could have shown it by Cochran; but they did not ask him the question. If they had, you can have no doubt as to the answer that would have been given. You cannot suppose that Cochran would have borrowed the book and let the prisoner read it before he had read it himself. Did the bare mention of Avery's having committed a murder cause his derangement? Why did it not produce the same effect when the story of the murder was first told. Why did it not produce this effect while the trial that lasted for weeks was proceeding, during which there was so much conversation respecting the murder? If the mention of the murder caused derangement in

the prisoner, it is remarkable that he should have exhibited no symptoms of it at the house, the only place, according to the evidence, where the murder or the trial was mentioned. It is wonderful that his derangement should not have seized him until he reached the lonely place where the murder was committed;—a place singularly suited to the accomplishment of the detestable object which he himself declares he had in view.

It has been said that after the death of Mrs. Cochran the prisoner was deeply afflicted—that he lamented sincerely what had happened. If this be true, it is not easy to see how it establishes the fact of his derangement. Suppose a man in a moment of passion should take the life of another, we may well imagine he would be filled with sorrow for what he had done, although he had the possession of his reason when he did the act. This would be the case with people generally, but some are so hardened that they can commit the most atrocious deeds without any reproaches of conscience—without any emotion of pity for those whom they injure. If it shall appear from examining the evidence that the prisoner felt no grief for what he had done—that he counterfeited sorrow for the purpose of deception, it will furnish the most convincing proof that he was not deranged.

It is manifest from the testimony of William Abbott, Jr., that the sorrow of the prisoner was feigned. He says that on the 23d of June, soon after the murder, he found the prisoner in James Cochran's pasture; he was lying on his face, and making a noise like a person in distress. The witness wanted to know whether his grief was real; he watched him with particular attention, and found that he shed no tears. Others less observing than the witness were without doubt deceived. The prisoner could counterfeit the voice of sorrow, but his tears were beyond his power. When sorrow is of a nature so deep as to prevent the shedding of tears it is always silent.

It is further urged as a proof of his insanity that he made no attempt to escape. Mr. Abbot says that he and Mr. Rob-

inson were appointed keepers over him. He made no attempt to get away because escape was hopeless.

William P. Blaisdell says he was in the jail in Hopkinton with the prisoner. An attempt was made by several persons to break the jail; the prisoner was one of the principal hands in urging forward the business. He broke some of the bolts and said he meant to go to Canada. He quarreled with a boy in the jail and boxed his ears for not discovering Mrs. Leach, the wife of the jailer, sooner than he did. It appears that he made an attempt to escape as soon as he had a prospect of effecting it.

It has been urged that the prisoner could have had no motive to murder the deceased; and that this circumstance is very strong to show his insanity. I wish you gentlemen to attend to the confession of the prisoner, from which you will learn what his motive was for the perpetration of this horrid deed.

John L. Fowler says that in September, 1833, he went to the State Prison, and asked the Warden if he might go into the apartment in which the prisoner was confined. The Warden consented. The witness requested the prisoner to give him particular information respecting the killing of Mrs. Cochran. He said he would if the witness would get Mr. Thompson and Mr. McDaniel out of the room. They went out, but Thompson returned back to the window, that he might hear what was said. The prisoner then said that Mrs. Cochran told him to ask her husband to go into the field with her and pick some strawberries; that her husband declined, as he was reading Avery's trial. The prisoner said he would go with her and told her husband he was going into James Cochran's pasture for them. He says that he and Mrs. Cochran went into James Cochran's pasture; and when they were there he asked her to go down into the Brook field, and told her that the strawberries were more plenty there than where they then were. She consented to go. He says that when they were in the Brook field he attempted to dishonor her. She said he was a dirty rascal—that she would tell her hus-

band and he should be punished. The prisoner told the witness he thought he should be sent to the State Prison, and he had as lief die; that he then struck her and put an end to her life. Mr. Thompson confirms the testimony of this witness in every particular.

Was the story told by the prisoner to Mr. Fowler and others, in which he confessed his motive for taking the life of Mrs. Cochran, the story of a maniac—of a deranged man—or was it the story of a man who possessed the full strength of his understanding? Consider the object which he had in view; the means selected to accomplish that object; and then say whether any man could have selected means better calculated to effect the object than he did. His object was to have unlawful intercourse with the deceased.

The pretext under which he went with her into the field was to pick strawberries. He selected the Sabbath; on any other day people would have been in their pastures and fields at work, and he would, probably, have been interrupted in the business he had in view. He found that the husband of the deceased was reading Avery's trial—a book that excited, at that time, a good deal of interest—and he knew that he would not lay aside his book to go into the field to get strawberries. In order to prevent all suspicion of any bad design, he told her husband that he was going into the pasture of James Cochran. This pasture was near the house of her husband and several other houses.

Expecting, probably, that the husband of the deceased would look to see what course they took, he went with her into James Cochran's pasture as he had mentioned. This place was not suited to his purpose; it was in sight of the road and within thirty rods of the house of her husband and of two or three other houses. He persuaded her to go to the Brook field, where she was murdered, by telling her that strawberries were plenty there.

You should remember, gentlemen, that the prisoner was well acquainted with this place: he knew there were but few, if any, strawberries there. It appears from the evidence that

a few days before the murder he was employed in making fence at this place; and the very day before he was sent there to get bark.

The place where the deceased was murdered was in a deep valley, lower by a hundred and fifty feet than the house of her husband. It was surrounded by thick woods on every side but one, and on that side no house was to be seen—none was near.

In this lonely, solitary place, where they were seen by no human eye; where the cry of distress could reach no human ear, the prisoner attempted to gratify his brutal passion. The deceased resisted him; threatened to tell her husband and have him punished.

If he did not effect his diabolical purpose, he at least attempted it; and the very attempt to effect such a purpose is a crime for which he was liable to be sent to the State Prison. When the prisoner found that he was resisted, and that he had committed a crime for which he was liable to be sentenced to the State Prison, he determined to take her life.

It has been said that he would not commit a murder, for which he would be liable to suffer death, rather than run the risk of being sent to the State Prison for an attempt to dishonor the deceased; that this is altogether incredible. The prisoner told John L. Fowler he would as soon die as go to the State Prison. But the fact is, he expected by destroying the life of Mrs. Cochran that he should escape all punishment. You remember, gentlemen, it has been testified that when he struck the deceased and her husband in the winter of 1833, and came very near to killing them, he stated that he got up and did the injury in his sleep; he made them believe, and he made all their neighbors believe, that he really was asleep. He expected to have been equally successful on this occasion. Accordingly, when Mr. Abbott found him in James Cochran's pasture soon after the murder and asked him what he had been doing, he said he had killed Sally; that he had the toothache, sat down by a stump and, as he believed, fell asleep, as he knew nothing until he had killed her. He told the hus-

band of the deceased that he had the toothache and sat down by a stump; and that he knew nothing until he had killed her.

I pray you, gentlemen, to observe the inconsistency,—the deceit, of the prisoner. He told Mr. Fowler that he struck the deceased with a stake—that she probably did not perceive him as he was approaching her to give the blow. This without doubt is the truth. The stake was found on the spot where the murder was committed; it has been produced and exhibited to you; and as the blows were received on the back part of her head, she did not, in all probability, see him as he approached her. In order to avoid punishment he stated to others that he had the toothache and sat down by a stump; that he knew nothing until he had killed her, and supposed he was asleep. It may be asked,—if he intended to make people believe that he was asleep, why did he confess that he killed her—state the instrument with which he did it, and all the circumstances attending the deed, without intimating that he was asleep? You will remember that this confession to Fowler and others was made in September. On the day when the murder was committed, he said he sat down by a stump, and knew nothing until he killed her, and supposed he was asleep. When he found that this story was not credited, he changed his ground; and now, instead of pretending that he was asleep, he contends that he was deranged; and as a strong circumstance to prove his derangement, he says that he could have had no motive to kill Mrs. Cochran.

That he attempted to have criminal intercourse with the deceased is apparent, not only from his confession, but from the circumstances that have been proved to you. Let us consider them.

Six witnesses testify that the grass was trodden down near the spot where the murder was committed, in a circular form, as if there had been a struggle. Three or four witnesses, on the other hand, say they do not suppose, from the appearance of the grass, that there was any struggle; that the grass was no more pressed down than might have been expected

from knocking the deceased down and dragging her away. But some of these last witnesses say that the grass was pressed down in a circular form. It is manifest that if the prisoner had only knocked her down and dragged her away, the grass would not have been pressed down in a circular form; if there had been a struggle, it would. It is clear that there was not only a struggle, but that it must have taken place before he struck her. Her comb, her calash, and one of her earrings lay on the ground, the other was in her ear, unlocked. Only one tooth of the comb was broken; her calash was unstained with blood. It appears from the evidence that the comb she wore was a large one and covered the back part of her head, where she received the blows. If the comb had been in her head when the blows were given, it would have been broken to pieces. If the calash had been on her head when the blows were given, it would have been bloody.

As the blows were struck on the back part of her head, they could not have caused one of the earrings to fall on the ground and the other to be unlocked in her ear. The comb, the calash, and one of the earrings must have been on the ground and the other must have been unlocked, before she was struck. How could all this have happened without a most violent struggle? For what purpose could a struggle have taken place between them, before a blow was given, if it was not for the purpose of having criminal intercourse with her? Why was she persuaded to go to the lonely spot where she was murdered, if he had not intended to have such intercourse? You must have known that this was the object of the prisoner, from the circumstances that have been proved to you, if he had not confessed the fact. It having been clearly proved that the prisoner attempted to dishonor the deceased, you cannot doubt that he killed her for the purpose of avoiding punishment, in the manner I have stated.

In the conduct of the accused you can discover great and appalling wickedness, but you can discover no mark of insanity. He had formed a deliberate plan to have unlawful intercourse with the deceased. The time, the place, and all the



means for accomplishing that plan were laid with unusual skill. The law, as I have already mentioned, is clear, that when a man is indicted for murder and rests his defense on the ground of insanity, it must be proved, beyond a doubt, that at the time when the act was done, he was incapable of distinguishing between right and wrong—that he did not know that murder was a crime.

You will find, upon examining the conduct of the prisoner, that in every part of it, when he did wrong he knew it perfectly. When he attempted to have intercourse with Mrs. Cochran, he knew he had committed a crime which condemned him to the State Prison. This he confessed to Fowler and others, and said he would as soon die as go to prison. When he killed Mrs. Cochran he knew that he had been guilty of murder; he knew what punishment the law inflicted on the murderer. When he first saw the husband of the deceased after he had killed her, and had confessed what he had done, he asked him if he meant to have him hung. In order to avoid this punishment he feigned the story that he sat down by a stump, and, as he knew nothing until he killed her, he supposed he was asleep.

It has been said by counsel, and it appears from the testimony of the physicians, that a man may be deranged as to one subject while he is rational as to every other. That such partial insanity sometimes exists there can be no doubt; but this cannot avail the prisoner, because it has not been proved that he was insane on any one subject. If it had been shown that the prisoner was partially deranged, in order to entitle him to a verdict of acquittal, it must have been further shown that the killing of the deceased was connected with such derangement. The connection between the act and this disease of the mind must be clear: the act must be produced by the disease. A person who is partially deranged is as much answerable as others for all his criminal acts not connected with his derangement. In order that the prisoner may be exempted from punishment, it should have been proved that he was under some delusion with respect to Mrs. Cochran, so

that he did not know that to kill her was a crime. If, for example, he had believed that he had received a command from Heaven to take her life, and under that delusion he had killed her, he would not be punishable; because he would not, in that case, perceive that the taking of her life was wrongful. But he acted under the influence of no delusion with respect to her that made him ignorant that the deed he committed was a crime: he was urged on by the violence of his unbridled passion to attempt to dishonor her. Finding that he had perpetrated a crime, for which he was liable to be confined in the State Prison, he resolved to take her life and to screen himself from punishment by telling the story of his being asleep, which, on a former occasion, had exempted him from suffering.

An attempt has been made to excite your sympathy in favor of the prisoner. This is not a difficult task. When a person is on trial for his life, it is natural to feel compassion for him—we place ourselves in his situation, and consider what would be our anxiety and our feelings, if we were on trial; and we willingly extend to him that pity which we should desire for ourselves. So strongly does this principle operate, that it suspends, for a time, the exercise of reason; we forget the welfare of the community and think only of the safety of the accused. But are the sufferings of the criminal alone to be regarded? If the crime of murder should go unpunished, what must be the sufferings of society? How wretched must be its condition! The lives of the most virtuous and useful citizens would be sacrificed; and scenes of violence and of bloodshed would be everywhere presented.

When the murderer is put on trial our pity is strongly excited in his behalf; but how little do we think of him whose life has been destroyed! He is removed from our sight; his connection with the world is at an end; he seems to be forgotten or to be remembered only by his nearest relatives and friends. It is a false, an ill-directed humanity that leads us to bestow all our compassion on the criminal, while we entirely forget the victim of his crime.

## THE JUDGE'S CHARGE.

CHIEF JUSTICE RICHARDSON. Gentlemen of the Jury: Appeals have been made to your feelings, in the course of the argument, on both sides; but you must take care not to let those appeals create any improper bias in your minds. Without doubt the situation of this unfortunate youth is, on the one hand, calculated to awaken compassion. But however amiable compassion may be on a proper occasion, you must remember that the question now is, not whether his situation is to be commiserated, but whether he is guilty or not guilty; that you are sitting in a court of justice, and that mercy is lodged in another department of the Government. On the other hand, the deed which it is admitted the prisoner has done, is calculated to excite deep feelings; but no feelings must be permitted to warp your judgment. The inquiry now is, not whether a murderer ought to be punished, but whether there is a murderer to punish. You are in the house of God<sup>18</sup>—and you will do well constantly to bear in mind that you are in the presence of Him to whose all-seeing eye your most secret thoughts, inclinations and motives are perfectly visible in the discharge of the most solemn duty that can ever devolve upon you—a duty, the right performance of which demands cool, calm, deliberate judgments, and honest hearts—the duty of holding the scales of justice even between the State and the prisoner. Let no improper motive disturb the balance.

The prisoner stands charged with the murder of Sally Cochran. To this charge he has pleaded that he is not guilty, and the burden of proving the charge rests upon the Government.

A contest between the State and a humble individual is apparently quite unequal. But the humanity and the wisdom of our laws leave a prisoner very little ground of apprehension on this account. For, in the first place, you are made

<sup>18</sup> The trial took place in a church, the Court House being too small to hold the audience.

the judges as well of the law as the fact, in order that, if he be condemned, he shall be condemned by laws which your judgment has approved as sound and reasonable. In the next place he is furnished with able counsel, and with the means of procuring the attendance of all his witnesses. And, further, it is the duty of the Court to see that he is placed on equal ground and that he has the full benefit of every legal principle that is applicable to his case. And it is made your duty to pause, and not pronounce him guilty, until every reasonable doubt of his guilt is removed from your minds. All this is done that there may be a fair and equal trial, and that there may be no convictions in doubtful cases. Punishment, to be salutary, must be seen and felt by all to be just.

During the trial of this case, how little have we thought of the deceased! We have felt for her scarcely a single emotion of pity. It is true that no feelings of compassion can avail the dead. They cannot recall her departed spirit; they cannot reanimate her mouldering dust. But for the benefit of the living, we must think of the dead.

When the deceased left the house of her husband, little did she imagine that she was to return no more; that she was separated forever from the dearest object of her affection. Little did she imagine that she had seen for the last time her infant children, on whose innocent features she had so often gazed with delight. Little did she suspect that the hand of a murderer was soon to be raised against her life; that in a few short moments she was to be sent to the judgment seat of God, and to receive her sentence for eternity.

Can a man who has perpetuated such a deed of barbarity and horror deserve your compassion?

I will not undertake to describe to you the grief of the aged parents of the deceased; the agony of her husband; or the distress of her orphan children.

I mention these things very briefly, that you may think of them; that you may feel the necessity of punishing the author of such complicated wretchedness.

It is a fact to be lamented, that murders within a few

years past have become much more frequent than they were. How is this to be accounted for? Not by the increase of population, because other crimes have not become more common. The reason is, that murderers, through the compassion of juries, have been acquitted altogether, or their crime has been reduced from murder to manslaughter. Impunity invites to the commission of crimes; and so long as juries shall acquit the guilty through compassion, so long murders will continue to increase. The Legislature have denounced the punishment of death against the crime of murder: you are sworn to execute the law. Whether the prisoner is guilty of the crime with which he is charged is the only question for your determination. No feelings of compassion should lead you from your duty. If you believe him to be guilty, the welfare of the community as well as the oath you have taken requires you to convict him.

I shall not examine the question, which has been discussed by those who have argued the case, whether it is fit and expedient that the crime of murder should be punished with death. That is a question to be settled by the Legislature, and not by a court or a jury. It is our business to administer the law as it is, and not to settle what it should be. It is enough for us to know that the statute declares, if any person shall commit wilful murder, such person shall, upon conviction, suffer death. The only question now to be settled is, whether the prisoner is guilty or not guilty, of having violated this statute.

There is very little either of doubt or controversy with respect to many of the most material facts and circumstances of this case.

The prisoner was of the age of eighteen—had lived in the family with the deceased about three years—was always a good boy; and, although sometimes cruel to the cattle, was always kind to the family—active in business—ready to obey—and never had been known to have any quarrel with the husband or the wife. On Sunday, the 23d of June, 1833, he went to the husband and told him the deceased wished to go

out and pick strawberries and asked the husband to go. But he, being engaged in reading, declined. The prisoner and the deceased then went out to the field together. This was about 9 of the clock in the morning. In about an hour afterwards, the husband, hearing a noise at the barn, went out and found the prisoner there. When the husband approached him, he at once stated that he had struck the deceased with a stake and killed her, and went with the husband to the spot where she lay. She was found among some bushes, about thirty feet from the place where her calash, comb and basket of strawberries lay, and where the stake with which the blows had been given was also found. When the prisoner was directed to go for help, he refused. But although left near the spot by the husband, he made no attempt to escape, but was afterward found at a little distance, lying upon the earth, with his face towards the ground, with his shirt partly off, making a noise like one in great distress, but there were no tears in his eyes. He seems to have been equally ready to confess the deed and to meet the consequences.

Thus far there is no doubt as to the facts and circumstances of this extraordinary transaction. The deed stands admitted, without any pretense of justifiable cause; and all which the evidence on both sides in the case discloses, is so far from showing any probable motive to do the deed, which can be deemed calculated to influence the determination of a rational mind, that it hardly enables us to form even a satisfactory conjecture of any motive whatever. And yet he was impelled to the deed by something more powerful than even the love of life itself. For he was aware of the consequences of the act. When he first disclosed the matter to the husband, he at once inquired if he would hang him.

This is a clear case of murder, if the prisoner had the use of his reason: and every person is presumed to have that until the contrary appears. This presumption is grounded on common experience, the only foundation on which a great part of our knowledge rests. We find by observation that men in general, with comparatively few exceptions, have the

use of their reason—and this renders it so probable that any individual we meet is in the common condition of men, that we always take him to be so until something appears to show the contrary.

There is no evidence in the case which shows any derangement whatever of intellect in the prisoner, at any time, except what results from his very extraordinary conduct in the night of the 6th of January, when he must have come very near taking the life of both husband and wife with an axe, when they were asleep together in bed; and his equally extraordinary conduct on the day when he took the life of the wife. But his conduct on those occasions, and the attending circumstances, demand the most attentive consideration and scrutiny.

The case, then, is reduced to this one inquiry: Had the prisoner the use of his reason? And we are of opinion that, if under all the circumstances of the case you have any reasonable ground to suppose that the prisoner could not have had the use of his reason, you are bound to acquit him: for a public execution for an act, probably done under the influence of insanity, instead of promoting the great ends of justice, would tend rather to excite alarm in the minds of the community and a suspicion that justice had not been duly administered.

And in order that you may decide the question presented to you, without any bias arising from an apprehension of danger to other persons from his acquittal, I feel it to be my duty to say to you, that, if acquitted on the ground of insanity, he will not be permitted to go at large, but will be confined, under the statute which makes provision for such a case.

It is clearly proved by medical books of high authority, and by physicians whose testimony is entitled to great respect, that very extraordinary cases of deranged intellect sometimes occur—cases of sudden derangement—cases of partial derangement, where the sufferer is insane on some one subject, and sane on all others—cases of concealed derangement on some particular subject, which is exceedingly difficult to de-



fect. Indeed, it appears by the evidence on this point, that, so various are the shapes it assumes, so different its extent in different individuals, there is often in it such a strange mixture of intellect and delusion, of bright thoughts and mere dreaming, that all our calculations, as to the forms in which it may be exhibited are baffled. New and extraordinary cases of the disease from time to time occur, which perplex and confound even those who have been longest and most thoroughly acquainted with the subject.

The testimony which has been laid before you, gentlemen, on this subject, merits and will undoubtedly receive your most attentive consideration.

It is well settled, that so far as the sufferer acts under the influence of the disease, he is not accountable. It is reason alone which can make any man answerable for his conduct in a court of justice. Humanity can hardly endure the thought of punishing an insane person for his insanity.

In settling the question of sanity in this case, you must constantly bear in remembrance that men who have the use of their reason do not commit crimes of great atrocity at the hazard of their lives without motive, without strong inducements urging them to the deed; and that when, in such case, no motive, no inducement, can be found, this may in itself be evidence of a want of the use of reason.

There is nothing in the evidence which shows that the prisoner had any evil act in contemplation when he went out into the field with the deceased. On the contrary it appears that he invited the husband to go with them. He carried no deadly weapon. The stake with which the blow was given was found by him at the spot. These circumstances deserve particular attention.

It will be very material to consider his accounts of the transaction in his confessions to Fowler and Thompson. He at first pretended that he had the toothache—sat down—fell asleep, and when he awoke found that the deed was done. When told by Stinson that this story would not do, he seems to have had another ready. He then said he believed he liked

her too well—that he made improper proposals, which she rejected; that she threatened to tell her husband, and that he, supposing that this would send him to prison, took her life in order to prevent that.

Nothing could, under the circumstances, have been more wild and incredible than the supposition that he could have been asleep when the blows were given. And the other pretense, that he took her life to escape imprisonment, although not quite so wild and incredible as the first, has very little probability in its favor, if he had the use of his reason. The proposal, although highly improper, was no crime; and no one in his reason could have supposed it to be a crime. Yet, according to his account, in order to escape imprisonment for this supposed crime, he did that which must immediately send him to prison and subject him to the punishment of death. You must consider whether these are pretenses that would occur to a sane mind.

False pretenses and contradictory statements are common with those who would conceal the truth. But here the prisoner has concealed nothing. He has confessed all. And it must be remembered we are now examining his confession, not for the purpose of learning what he has done, but for the purpose of ascertaining the state of his mind when he did the act for which he is now on trial. And it is a very remarkable feature in the case, that, although he has set up the very incredible pretenses just stated, no witness has ever heard him set up any pretense of a want of understanding at the time. What occurred to almost every mind in the community upon hearing of the transaction seems never to have occurred to his mind.

If, therefore, nothing were disclosed of the conduct of the prisoner except what took place on the 23d of June and afterwards, it would be your duty to pause and consider well the subject before you pronounced him guilty. For you find no motive—no evidence of settled ill-will, or hopeless attachment, that would lead him to a deed so horrid, so fatal to himself. It is difficult to conceive, that either love or hatred of sufficient

power could exist in a heart so young, without disclosing itself in many ways to those around him. And yet you will look in vain through the evidence laid before you for any such disclosures. He seems to have lived in the family just as other lads of his age lived in a family, without anything in his conduct or conversation at all out of the common course. His conduct on the 23d of June, if it stood alone, would present a very extraordinary case. But however extraordinary his conduct on that occasion may appear, it is not at all more so than his conduct on the night of the 6th of January.

On that occasion both the husband and the wife were severely wounded by him with an axe while they were asleep in bed. On that occasion, as in June, when he was first discovered, he appeared to be in great distress, and confessed and admitted all that he had done. Now if he then had his senses and murder was his purpose, he might easily have finished the work of destruction. Both the husband and the wife were rendered senseless for some time by the blows received; yet when he found them reviving, instead of despatching them as he might easily have done, he called up the mother of Mr. Cochran, and rendered them all the aid in his power. On neither occasion did he make any attempt to escape. The guilty fly when no one pursues. But he did not attempt to fly.

And what is certainly most remarkable with respect to the transaction in January, such had been his conduct in the family and such was the confidence reposed in his integrity, that everybody seems to have been satisfied with his account of the matter, and to have supposed that he must have been asleep when the blows were given. This circumstance deserves a very attentive consideration.

Now, if he was in his senses in June when he took the life of Mrs. Cochran, it is hardly credible that he was otherwise in January when he made the attack upon the husband and wife. But, on the other hand, if the attack in January was made under the influence of a deranged intellect, it is very difficult to believe that the act for which he is now on trial was not done under the same influence.

If he has been all the time sane, his conduct has certainly been most extraordinary. And on the other hand, if he has been otherwise than sane, it is a very extraordinary case of insanity. And here the great difficulty in the case meets you. And I must confess that all my experience among men, and all that I have seen and known of their conduct and of the motives and views which ordinarily influence their conduct, furnish me with no satisfactory solution of the difficulty, which this view of the case seems to me to present. But you, gentlemen, must consider and judge for yourselves.

There are, however, other circumstances to be considered.

The place where the act was done, and the situation in which the body was found, and his conduct at the time, must be attentively examined. It appears that the body had been dragged about thirty feet, and left among some bushes. This circumstance certainly seems to indicate that the prisoner must at first have had some purpose of concealing the transaction; and that would be evidence of a consciousness of guilt. But then, on the other hand, the calash, the comb, the basket of strawberries and the stake were left upon the spot where the blows were given, in the open field, in full view, and he immediately returned, and not only disclosed all he had done, but conducted the husband to the spot, where the body had been left. It is for you, gentlemen, to judge whether these circumstances and his conduct, so far as it is disclosed in the evidence, do not on the whole show the unsteady, wavering operations of an unsettled intellect rather than any plans which conscious guilt can be supposed likely to have adopted for the purpose of escaping punishment.

There is evidence in the case which has a tendency to prove that the prisoner has a bad temper, and that he has been cruel with respect to animals. This must be duly weighed. But you must at the same time recollect the evidence in favor of his general good character, his kindness to the children, his industry, his readiness to obey. He is entitled to have this fairly weighed and to have the full benefit of it. Everyone in his situation and at such an hour as this must be to him,

if he has before sustained a good character, is to be allowed to avail himself of it to the utmost extent it can go. It should have its due weight. It is one of the advantages of a good reputation, that it has its weight on such an occasion.

There is evidence in the case tending to prove a predisposition to insanity in the family to which the prisoner belongs. There is also evidence offered to show that his head was disordered and enlarged in his infancy. There is, however, other evidence which goes to contradict all this. How the fact is, you must determine. If you find a predisposition to insanity in the family, it does not prove the prisoner to have been insane; it can only render it more probable that he was so, and is to be weighed with the other circumstances in the case.

It is said by Dr. Cutter that there are in the looks of the prisoner, in the motion of his eyes, in his behavior on this trial, symptoms of deranged intellect. Dr. Cutter has had great experience in cases of insanity, and his opinion is entitled to much weight. You have also had an opportunity to observe the conduct and appearance of the prisoner, on this occasion, and what you have seen must be carefully considered.

The testimony of William Abbott must also be examined. He found the prisoner lying upon the ground, apparently in great distress, with his shirt partly off; when asked why he took off his shirt, his reply was that he did it for the purpose of hanging himself, because he supposed he must be hung. This certainly shows that he was conscious of the consequences of the act which he had done. But the witness further states that the prisoner slept quietly and soundly to all appearance the next night. And it is very difficult to conceive how one so young, one who had been brought up in a Christian community, amid all the advantages of moral and religious instruction which the prisoner must have enjoyed; one whose general character had been so fair, could at once become so hardened in iniquity, so indifferent to the awful consequences of such a deed, as to be able to exhibit a mind so composed, a conscience so quiet, immediately after the transaction, if he

was in his right mind. In a Roman tribunal, two sons who were found quietly asleep in an apartment, where the body of their murdered father was also found, were at once acquitted of the murder, because it was supposed to be impossible that they could have slept quietly immediately after such a deed.

It has been insisted by the Attorney General, that when a man generally acts and talks rationally, this is evidence of a sound mind. And without doubt it is so. But it is a well-established fact that men sometimes are sane on all subjects but one, and perfectly insane on that; and that the question now to be settled is, not whether the prisoner is generally sane, but whether the act for which he is now on trial must not have flowed from some partial derangement of his understanding.

The attempt to escape from prison, made by the prisoner and others, is urged against him as tending to show a consciousness of guilt. It is certainly to be weighed among the rest of the evidence. But while you examine that circumstance, you must remember that on the day when he took the deceased's life, and when he was at large, and he had an opportunity to escape, he made no attempt.

It has also been insisted that the prisoner persuaded the deceased to go to the field; that he knew the husband was engaged and would not go, before he invited him; that he induced the deceased to go to the fatal spot by representing to her that the strawberries were in plenty there; that he at first used force and violence to obtain what he had said he only proposed to her; and that to escape punishment for that force and violence, he took her life. All this may be true, but there is very little of it which is shown to be so by the evidence. It is almost entirely mere conjecture. There is no evidence that the prisoner first invited the deceased to go to the field. There is nothing to show what was done at the spot but the condition of the grass, the situation in which the calash and comb were left, and the appearance which the person and clothing of the deceased exhibited when she was

first found. Some of the witnesses think that the grass was so trodden down as to indicate a violent struggle, but others are of opinion that the grass would have exhibited the same plight had she been only struck down and dragged away from the place; and there is no evidence that anything about her person or clothing indicated any such struggle as it is insisted must have taken place.

You must carefully examine and compare all these circumstances, but take good heed that you do not let mere conjecture stand in the place of proof.

I have now called your attention to what seem to me to be the most material circumstances of the case—and with these remarks and directions shall submit the case to your decision.

*September 12.*

The *Jury* retired to consider the case late last night, after the charge of the CHIEF JUSTICE, and at half-past 8 o'clock this morning brought in a verdict of *Guilty*.

### A SECOND TRIAL.

After the pronouncing of the sentence, which the prisoner received without indications of alarm or terror, he was remanded to jail to await execution. His counsel, however, confident that he ought not to be hanged, and feeling a positive conviction that he was irresponsible for his acts, either through mental impotency or insanity, sought every possible pretext for a new trial. They moved that a new trial be granted on the ground that the jury, after the charge, and before making up their verdict, took supper at the Eagle Hotel, in Concord, attended, not by an officer of the court, but by a servant only; and that some of them went unattended to a barber's shop, and mingled with people who talked of the probability of a conviction.

At the term of the Superior Court, held in December following, a new trial was granted, but the case was continued at the next term of the Court of Common Pleas until the term in September, just one year from the time of the first conviction.



*September 8, 1835.*

The case was called today, Justices Joel Parker and Nathaniel G. Upham, and County Justices Wadleigh and Whittemore, sitting on the Bench. The judicial officers officiating were those in the former trial, except that Judge Parker took the place of Judge Richardson, and Judge Upham<sup>19</sup> that of Judge Parker. The counsel were the same. On the former trial fifty-three jurymen were called before a panel could be filled. On the second trial, fifty names were required before twelve could be selected.

The trial was but a repetition of that of the preceding year. The same witnesses were called and the same arguments produced.

*September 12.*

On this fifth day, the jury, much to the disappointment of the public, and especially of the counsel for the defense, rendered a verdict of guilty. Each member of the *Jury* was called by name and answered *Guilty*.

### THE SENTENCE TO DEATH.

JUSTICE PARKER. Abraham Prescott, you have been indicted, arraigned and tried for the murder of Mrs. Sally Cochran. You have had able counsel assigned you, who have done all that human effort could do in urging every argument in your behalf, and in making every preparation possible in your defense. Every means that has been asked, and every facility which could be given you to elicit the truth, have been granted you by the Court. All the light which it was in your power, by the most experienced witnesses, in your own and neighboring States, to throw upon the secret operations and sudden derangements of the mind, and all the evidence which the highest records of the history of man could

<sup>19</sup> UPHAM, NATHANIEL GOOKON. (1799-1869.) Born Deerfield, N. H. Judge Superior Court New Hampshire, 1833-1843. Superintendent Concord Railroad 1843-1863. President Concord Railroad 1863-1866.

furnish in this respect, have been attempted to be communicated and explained in your trial. Every presumption which the law, in its charity, indulges in favor of innocence, has been extended in your behalf. Your right of challenge as to the individuals by whom you would be tried has been exercised to its full limit, and under all the circumstances which could contribute to give you confidence in any just defense, with the sympathies of a Court sedulously anxious that no circumstance that could operate in favor of your innocence should pass without making its due impression, after a protracted, faithful and impartial trial, you stand out from your fellows, charged, tried and convicted as a murderer.

Human eye, under all the guarded operations of its vision, in the enforcement of laws designed to protect the innocent rather than punish the guilty, can see nothing in your case that can screen you from the awful consequences of that deed that struck to earth an unoffending victim—that desolated the home of an individual who had acted the part of your protector and parent, that left his children motherless, and caused the bright hopes that had clustered around him to go out in the darkness of an untimely death.

A jury of your country have found that with ruthless hand, with sound mind and malice of heart, you executed the fell purpose with which you have been charged. The blood that flowed out upon the instrument by which you effected your deed of cruelty, and that sank into the earth around the mangled corpse of the deceased, cries aloud for such reparation as your forfeited life may give to a violated law.

It is pitiable that one so young should have so broken forth as you have done from the apparent harmlessness of your previous life to a deed of such awful atrocity. The mind is appalled at such wickedness; and you stand forth unto those who are commencing a career of vice, or who bear within them the malice of the murderer, a fearful example of the effects of that mad passion that imbrued your hands in blood, that has brought woe upon your aged parents, that excites in the breasts of the ministers of justice, on this occasion, unmingled

sorrow, and that must shortly send you from the scaffold to the grave.

We arrogate no perfection to man's judgment, but in the slow, careful manner in which your trial has proceeded, we would hope that it might bear this resemblance to an unerring judgment that it is a passionless act of justice.

He who looks in upon the heart and mind may see in your case circumstances to relieve you from the responsibility of your acts, which man cannot see. But we caution you to beware in this matter. We adjure you to see to it that no groundless delusion shall deceive you into a belief of innocence; that no malice of the heart shall be brought to assume in your view the ungovernable impulse of an irresponsible will; that no purpose of base crime shall have sent woe to a bereaved family and consternation through a peaceful community, while a brooding desire to screen yourself under the lawlessness of an unaccountable being shall divest you of the horrors of that guilt that in the eye of your fellows rests upon you. Rather scrutinize yourself closely, and strive to seek out in your heart the horrid impulses that broke out in noonday in acts of blood; and during the brief space allotted you on earth—so far as this tribunal of the Government influences your destiny—seek, we beseech you, that only source of healing for the chief of sinners that has been provided in Infinite mercy; and spend each remaining moment of your existence in the only manner which can be essential to you—in a preparation for that eternity to which you are so rapidly hastening—a preparation to meet your final Judge.

Listen, then, to the sentence which is to be the limit of your life; but, while you listen, remember that we claim no power over that which we cannot give, and do not, by our fiat, take away the life of a human being. It is the law that speaks, and not the humble individual whose painful duty it has become to declare its sentence to you. Listen, then, to the sentence which this Court now pronounces upon you, at this last time on earth of our beholding you, which is that you, Abraham Prescott, be taken hence to the prison from which you

came, and from thence to the place of execution, and there be hanged by the neck until you be dead. And may God, in His infinite compassion, have mercy on your soul.

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During the delivery of the sentence, the prisoner seemed entirely indifferent, and manifested, it is said by those who saw him, not the least emotion. He presented the appearance of a person of very low mental organization, and acted as though he had no idea of the horrible fate to which he had just been sentenced.

The day fixed for the execution was the 23d of December, 1835, between the hours of 10 and 12. The prisoner was taken back to jail, at Hopkinton, and confined in a cell.

After the second conviction, and while the prisoner was lying in jail awaiting execution, great efforts were made to save him from the gallows, and all possible efforts were brought to bear upon the Governor to pardon or reprieve the criminal. In the month of December, the Justices of the Court signed a petition to the Governor for a reprieve until the meeting of the Legislature in June, when it was hoped some action would be taken to commute the sentence. The execution was to take place on the twenty-third, but a few days before the appointed time, Governor Badger, being urgently pressed to bestow the executive clemency on the prisoner, issued an order granting a reprieve until the 6th day of January, in order that the Council, which was to convene before that day, might have an opportunity to express their opinion on the question of a reprieve until June. But notice of the postponement was not given publicly in session to prevent people from gathering to witness the execution on the twenty-third. They assembled in great numbers, from far and near, and when they learned that the execution had been postponed, their disappointment was expressed in a boisterous and uproarious manner. They shouted and hurrahed, and made such demonstrations as frightened a lady who was ill so much that she died. It was one of the most disgraceful scenes ever witnessed in the state.

A meeting of the Governor and Council was held, when the subject of a further reprieve until June was considered. The argument in favor of the measure was that some doubt existed regarding the moral responsibility of the perpetrator of the deed. On the other hand, it was maintained that he had had two trials by impartial juries, and been defended by the ablest counsel to be obtained, and that it would be presumptuous for the Council to say they were prejudiced or influenced against the respondent. The Legislature, too, it was said, would not be disposed to interfere in

the case. It was therefore decided to take no action in the case, but to notify the sheriff to execute the order on the sixth day of January.

### THE EXECUTION.

*January 6, 1836.*

On the morning of this day the avenues leading to the old town of Hopkinton from all directions were early filled with teams, bearing heavy loads of men, women and children to witness the scene. It was said that fully ten thousand people remained in open air in mid-winter for hours, that they might have opportunity of witnessing the execution. There were no such demonstrations as characterized the gathering two weeks before. The fact that a lady had been hastened to her death by the excitement of the previous occasion had the effect to subdue the boisterous passions of the multitude.

At a quarter before eleven o'clock, the sheriff and his attendants, and the clergy, went into the hall of the jail, in front of the cell in which Prescott was confined. Sheriff Carroll read the indictment of the Grand Jury, and a record of the proceedings thereon through the course of the two trials, the reprieve of the Governor, and the warrant for the execution. This was done without opening the cell door, but so the prisoner could hear it through the opening in the door. Prayer was offered by Rev. A. T. Foss, who was Prescott's spiritual adviser. The prisoner was taken from the jail, with his arms pinioned, and placed in a vehicle with two officers. Two sleighs followed, in one of which was the coffin for the dead body of the victim, and in the other the officers and the clergy. They passed out from the village nearly a mile, into an open field, where the gallows was erected. They ascended the scaffold, the prisoner being supported partially by Rev. Mr. Chase, the Chaplain, and trembling more with cold than from fear, gazed about on the people. On the scaffold he was seated with the officers, while the warrant and order for the execution were again read. Prayer was offered, the usual arrangements made, by securing the feet and arms, the cap was drawn over his face, and on a signal given by himself the prop was withdrawn, and he fell and died with scarce a struggle.

Before his death he made no special confession, but always admitted the murder. He at one time said he wanted to be rich, and thought he could kill Mr. Cochran and his wife, and secure the property. He admitted that he desired to kill them six months before the murder, when he arose in the night and struck them with an ax. He said he thought he would kill Mrs. Cochran, and then call down Mr. Cochran and kill him. Of this he had thought for some time. He couldn't help thinking of it. At one time, on being urged to confess why he did the deed, he said he made an improper proposition to Mrs. Cochran, and she chided him for it, and threatened to tell Mr. Cochran of it, and he became so mad that he struck her. Subsequently he denied this, and said that he was so annoyed by the people teasing him to tell why he committed the crime, that he told them this to get rid of them.

Some time before the execution he was sitting in a thoughtful mood, when some one asked him of what he was thinking. He said, "Nothing, only how soon it will be over with." He then inquired about some early friends who went to school with him. Just before going to the scaffold, he warmed his feet, and said he "had suffered much, but would soon be better off." He inquired regarding the pain of hanging, and remarked that it was just three years that day since he struck Mr. and Mrs. Cochran in January, 1833, and fourteen years that month since Farmer was hung.

He had but little idea of religious matters. There was, he said, probable a future, but he should be better off than to remain forever in his cell. Death would terminate all his sufferings, he said. He said it would not be right to hang others and let him go. His last words were, "Lord have mercy! Lord have mercy!" He had a great aversion to having his body dissected, which he thought would be the natural disposition of it, as his friends were poor, and could not spend money to bury him.

After the body had hung half an hour, life was pronounced extinct. It was then taken down and conveyed to Pembroke for burial. A few citizens contributed the requisite sum. A story was circulated that in the night time two young men came and took the body away, pretending to carry it to Rumney, where the friends of the deceased lived; but, as the story ran, had it taken to the Medical College at Hanover. Many persons believed this was the disposition made of it. But Judge Burns, a reliable citizen of Rumney, certified that the body was conveyed to that town and buried there. This put the matter at rest.

## THE TRIAL OF ELI H. HALL FOR ROBBERY, GENESEO, NEW YORK, 1865.

### THE NARRATIVE.

Two men in a New York village had a dispute about the ownership of a watch, and one of them, charging the other with having his watch, got a search warrant from a magistrate and with a constable started out to find the watch. They met the accused on the street, and, on the constable calling out to him, "Johnson, have you Eli's watch?" he replied, "No, you may search me." The constable did so and found a watch in his pocket; but when he demanded, "Eli, is this yours?" the claimant replied, "No, but this will do," at the same time taking hold of the watch, breaking the chain, and putting it in his pocket with the exclamation: "I am all right; I have two for one; let him go."

The accuser now became the accused, being indicted for robbing Johnson of his watch, and, after a trial, is found guilty by a jury. But on appeal to the Supreme Court the conviction is set aside, the Court deciding that merely snatching an article from the person of another is not robbery.

### THE TRIAL.<sup>1</sup>

*In the Court of Oyer and Terminer of Livingston County  
(Geneseo), New York, May, 1865.*

HON. ERASMUS D. SMITH,<sup>2</sup> Judge.

*May 3.*

An indictment for robbery had been found against the prisoner. It charged that he, on March 19, 1863, at the town

<sup>1</sup> \*Parker's Criminal Reports. See 4 Am. St. Tr. 88.

<sup>2</sup> SMITH, ERASMUS DARWIN. (1806-1883.) Born De Ruyter, N. Y. Studied for and was admitted to the Bar and became Master in Chancery in 1832. A Justice of the Supreme Court of New York from 1855 to 1877. He served in the Court of Appeals and was General Term Justice in 1872-1877.



of Geneseo, in Livingston County, made an assault upon one George F. Johnson and took from him a watch of the value of twenty-five dollars.

*George J. Davis,*<sup>3</sup> District Attorney, for the People.

*W. H. Kelsey,*<sup>4</sup> for the Prisoner.

#### THE EVIDENCE.

*George F. Johnson.* On the 19th of March, 1863, I was going up the street and Eli Hall, the prisoner, and Ranger called me to stop; I did so and they came up; Ranger said: "Johnson, if you have got Eli's watch you had better give it up." I said I hadn't, and told him to search me; he found a watch in my pocket and asked Eli if this was his; he said "no, let me take it." He then asked if I had another, I said yes. I took it out of my pocket and Eli took hold of it and jerked it off, breaking a cord fastened to the watch which went around my neck, and said, "I'm all right—go to hell, you damned

old fool." The value of the watch was \$15.

*Cross-examined.* This took place in the day time, along towards night; there were a number standing around; had had a previous transaction that day with Hall about a watch, half or three-quarters of an hour before; before I left the hotel Hall accused me of having his watch; Ranger was a constable.

*Alanson Ranger.* On the 19th of March, towards night, Eli Hall called on me to execute a search warrant against a man who had his watch; I went over and Johnson was going along the road, and Eli said, "Damn him,

<sup>3</sup> DAVIS, GEORGE JACKSON. (1826-1895.) Born Ischua, N. Y. Graduated Dartmouth 1844. Read law and began practice in Geneseo remaining there until 1866, being District Attorney 1863-1866. Was re-elected in 1866, but resigned and removed to St. Louis, where he became a prominent lawyer, mostly in insurance and corporation cases. He was a member of the St. Louis Municipal Assembly for three years and for a long time was United States Commissioner and Referee in Bankruptcy. He was able, keen-minded and of great energy. He died in St. Louis. See Bench and Bar of St. Louis, Kansas City, 1884. Doty History of Livingston County, N. Y. Dartmouth Gen. Cat. 1769-1910. St. Louis Globe-Democrat, Oct. 17, 1895.

<sup>4</sup> KELSEY, WILLIAM H. (1812-1879.) Born Smyrna, N. Y. Admitted to Bar and began practice in Geneseo. Published the Livingston Register until 1840. Surrogate Livingston County, 1840-1844. District Attorney 1851-1853. Elected as a Whig to the 34th and 35th Congresses 1855-1857. Re-elected as Republican to the 40th and 41st Congresses. Continued practice at Geneseo until his death. Was more of a politician than a lawyer. See Doty Hist. of Livingston Co., Lanman Biog. Cong. Direct.

there he is now." We went out and overtook him upon Center street. I said to him, "if you have got Eli's watch, you had better give it up." He said he hadn't, and said, "search me." He threw his clothes open and I took out a watch and handed it out and asked if it was his; Eli said "no, let me take it." Then I asked if he had another, and he took out a composition hunter's watch, that had a chain on it, and I said, "Eli, is that your's?" He said "no," but he took hold of it and yanked it loose, breaking the chain, and Eli said, "Damn him, I've got two for one—let him go."

*Cross-examined.* Hall called on me to assist him in recovering a watch that Johnson had got

from him; Johnson spoke about Eli wanting to trade, and Eli asked him \$3 to boot; this conversation was when the watch was taken.

*The Counsel for the Prisoner* raised the question that this was not a case of robbery. The COURT held it was.

*George F. Johnson* (recalled). I made a complaint against Hall before Squire Stevens; I saw Mr. Davis, the District Attorney there, I told him I had settled; that Hall wanted to keep one of the watches till he found his, and that he would not settle in any other way; did not know but I and Hall then went to the tavern and drank together; I stated that by that settlement I got back one of the watches.

*The Counsel for the Prisoner* asked the Court to charge:

1. That there is no felonious intent proven; the COURT refused so to charge, and the defendant's counsel excepted.
2. That if Hall believed that he was getting his own property back or security for it, that then there is no felonious intent proven. The COURT refused to so charge, to which refusal defendant's counsel excepted.
3. That the mere snatching of the watch from the hands of the complainant does not constitute robbery, for the reason that there was no injury done to the person, and there was no struggle for the possession of the property, and there is no proof that there was any terror excited in the mind of the complainant, or that any threats were made. The COURT refused to so charge.

*Mr. Kelsey.* There is no felonious intent proven. To constitute robbery, the property must be taken *animo furandi* with a felonious intention to appropriate the goods to the offender's own use, and there must be a felonious intent with regard to the goods charged in the indictment; it is not enough that the prisoner had at the same time an intent to steal other goods.

In this case there is no intent to steal shown; the whole of the testimony shows that the defendant intended to recover his own property, that he alleged the complainant had improperly obtained from him; and when he found that he could not get his own property, he seized the property of the complainant as surety for his own.

The felonious intent is the gist of the offense. If the defendant snatched the watch supposing it to be his own, or to compel the complainant to return to him his own watch, the offense is not robbery. The jury should determine, from all the facts and circumstances proved, what that intent was. The question of intent is always a question of fact to be determined by the jury, under proper instructions from the Court.

All the circumstances tend to disprove the felonious intent. The defendant procured a constable to go with him in search of the complainant, for the purpose of recovering his own property; and when the complainant refused to deliver defendant's watch, the defendant snatched the watch that he did produce. It is for the jury to say with what intent the act was done.

#### THE JUDGE'S CHARGE.

The COURT. Gentlemen of the Jury: The case is in a very narrow compass. Some questions of law have been discussed in your hearing and they have been disposed of as you have heard. The indictment is for robbery in the first degree; the statute defines that offense in these words: "Every person who shall be convicted of feloniously taking the personal property of another from his person or in his presence, and against his will by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." The evidence upon the part of the prosecution consists of that of the prosecutor and the constable, and is, that Hall met the complainant on the highway, and the complainant exhibited one watch which Hall took, but said it was not his, and the complainant

then exhibited another, which the defendant seized, breaking the chain. The Court are of the opinion that if you believe the statements of these witnesses, the evidence will justify you in finding that that degree of violence was used by the defendant which will constitute the offense, provided all the other elements of the offense are established. The defense claims that there is evidence that the defendant believed that this was his watch, or that he had the right to take it, to secure the return of his watch. There is no evidence that this was his belief, and the instruction to you is, that if you believe the evidence of the People, the testimony is sufficient to warrant you in determining that the defendant did commit the offense charged in the indictment.

### THE VERDICT.

The *Jury* found the prisoner *Guilty*.

### THE APPEAL.

The *Prisoner* appealed from the conviction to the Supreme Court, which, in December, 1865, reversed the judgment and ordered a new trial, holding that merely snatching an article of property from another is not robbery, saying:

"The crime of robbery is a high offense, one of the highest in the law, and involves, upon a conviction in the first degree, imprisonment in the State prison for a term not less than ten years. It consists, as defined by statute (2 Rev. Stat., 677, sec. 55), 'in the felonious taking the personal property of another from his person, or in his presence and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person.'

"It is not pretended in this case that the prosecutor was put in any fear of injury to his person. The crime rests upon the other portions of the definition. The question was whether it was taken with a felonious intent, by violence to the person of the prosecutor. The judge instructed the jury in substance that the degree of violence used was sufficient to warrant them in finding the defendant guilty of the offense. In this I think the learned judge erred, although the view taken by him is probably warranted by several English cases. The mere snatching a thing from a person has, in terms, never been considered robbery, but has been in repeated cases held not to be robbery. The snatching of a bundle suddenly from the hand of a boy in the street was held not to be robbery in McCauley's

case (1 Leach, 287; 1 Roscoe Crim. Ev., 898; 2 Russ., 67). The snatching of an umbrella suddenly out of the hand of a woman, as she was walking in the street, was held not to be robbery. (2 Foster, 708; 2 Russ. on Crim., 67.) In Stewart's case it was ruled by Lord Holt that snatching a hat and wig from the head of a person walking in the street was no robbery. (2 East, 702.) And yet, in several cases quite like this, snatching from the person was held to be robbery. In Lapier's case (2 East P. C., 57 and 708), earrings were pulled suddenly from the ears of the prosecutrix in a crowd, with such violence as to draw blood from her ears. This was held to be robbery. And in Mason's case (Russ. & Ryan, 419), the prisoner seized the seal and chain of the prosecutor's watch and pulled it from the fob, and it being secured by a steel chain around the neck, broke the chain by two or three jerks, and made off with the watch. This was held to be robbery.

"But I do not believe in such law, and do not think these cases were rightly decided. These are really nothing but cases of snatching from the person. It is, it seems to me, straining the law to hold that these cases are really distinguishable in principle from those above cited and numerous other cases holding that mere snatching from the person is not robbery. The fact that a little blood was drawn from the ear in the Lapier case, and two or three jerks were made to break the chain holding the watch around the neck in Mason's case, are circumstances of dissimilarity too insignificant and non-essential to turn a case of larceny—if the intent were felonious—into a case of robbery. It seems to me almost trifling with fact and law to say the earrings in Lapier's case, and the watch in Mason's, were taken with such violence to the person, within the proper sense and meaning of that expression in our statute, as to constitute the crime of robbery.

"A much more rational view of the law of robbery is taken in the case of *McLosky v. The People*, in 5 Park. Crim. Rep., 366. In this case, Judge Emott says: 'The property must be taken by violence to the person which means more than an assault and battery. The violence must be sufficient to force the person to part with his property, not only against his will, but in spite of his resistance.' The gist of the crime of robbery is the force and terror. (1 Hale P. C., 552; 2 East P. C., 707.)

"The especial heinousness of the offense of robbery over simple larceny, consists in the terror and fear inspired, and in the apprehension and danger of injury to the person involved in the commission of the offense. When there is nothing to inspire fear, there must be superior force, and the property must be relinquished upon a struggle, and upon compulsion. In the Lapier case a mere child might have snatched the earrings from a grown up, strong woman. It would be preposterous in such a case to say that the crime was robbery. So in Mason's case, a boy of ten or twelve years of age might, by surprise, have snatched the watch and broke the chain by a sudden jerk or two from a strong, athletic man, and run off with it before he could be arrested or hindered. I cannot think, in such a case, the boy could be convicted of robbery. The violence to the

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person essential to constitute robbery, must be actual, and not constructive. There must be such force employed, or such degree of force, as shall overcome the free agency or power of resistance of the person despoiled. This rule only applies to cases where the property is taken from the person, or in his presence, and against his will, by violence to his person and with a felonious intent, and not to that class where property is taken by putting a person in fear. Upon this question of felonious intent, it seems to me the facts in this case rather repel the inference of a felonious intent. The property was taken in the day time, in the public street of a populous village, and in the presence of a constable and other persons, and where it was impossible for the prisoner to get away with the property, and where the facts were necessarily all open and so well known as to render it impossible for the prisoner to appropriate the property to his own use, or deprive the owner of it except temporarily.

“For these reasons, I think the exceptions to the charge and to the refusal to charge as requested, that mere snatching was not robbery, should be allowed, and the case should be submitted to another jury. The conviction should therefore be reversed, and a new trial ordered.”

# THE TRIAL OF GERALD EATON FOR THE MURDER OF TIMOTHY HEENAN, PHILADELPHIA, 1868.

## THE NARRATIVE.

The story here is of an election in that great American city, in the State founded by the Quaker William Penn, which has had for many years an unenviable reputation in the matter of election methods. There is a quarrel among some of the most abandoned and disreputable of the party henchmen, pistols are drawn and, as they all emerge from a tavern, half crazed with drink, the weapons are brought into use and one of them is mortally wounded. He has powerful friends and is, in addition, a brother of the champion pugilist of the world, John C. Heenan. Three of the gunmen are apprehended and, though one of them makes his escape, the other two are indicted and one, Gerald Eaton, is convicted and sentenced to death.

Extraordinary efforts are made by his friends to save him, but without avail, and he is hanged on the same gallows and at the same time that the gentlemanly murderer Twitchell<sup>1</sup> was to suffer the extreme penalty.

## THE TRIAL.<sup>2</sup>

*In the Court of Oyer and Terminer, Philadelphia, November, 1868.*

HON. FREDERICK C. BREWSTER,<sup>3</sup>  
HON. JAMES R. LUDLOW,<sup>4</sup> } *Judges.*

*November 27.*

An indictment had been previously returned by the Grand

<sup>1</sup> See 6 Am. St. Tr. 1.

<sup>2</sup> See *Id.* Trial of Twitchell.

<sup>3</sup> See *Id.*

<sup>4</sup> See *Id.*



Jury charging Gerald Eaton, William Nellis and James Trainor with the murder of Timothy Heenan on June 12, 1868. The latter had escaped from the jurisdiction, but Eaton and Nellis were put on trial today, having at a previous arraignment pleaded *not guilty*.

District Attorney *Sheppard*<sup>5</sup> for the Commonwealth.

*Rufus E. Shapley*,<sup>6</sup> *James V. McDonough*<sup>7</sup> and *Charles W. Brooke*<sup>8</sup> for the Prisoner.

*Mr. Brooke* asked a separate trial for Eaton, which was granted by the COURT.

A large number of jurors were summoned and their examination and selection occupied four days.

November 31.

District Attorney *Sheppard* opened the case to the jury, describing it as a fight to the death among a low class of political henchmen.

<sup>5</sup> See 3 Am. St. Tr. 308.

<sup>6</sup> SHAPLEY, RUFUS EDMONDS. (1840-1906.) Born Carlisle, Pa. Graduated Dickenson College, 1860. Admitted to Philadelphia Bar, 1866. His practice was principally in civil and corporation cases. In 1874 he was the leading counsel in *Bradley v. American Steamship Co.*, where it was decided that a passenger could receive salvage money. He was counsel for the Philadelphia Fire Department and twice the City's Solicitor. He was leading counsel for the Auditor General and State Treasurer in the proceedings for their removal by the Governor in 1891. Author of "Solid for Mulhooly," a political satire on boss rule. In collaboration with Ainsworth R. Spofford, Librarian of Congress, he edited "Library of Wit and Humor," in 5 volumes. See Appleton Cyc. Nat. Cyc. Am. Biog. Penn. Bar Association Reports. 1906.

<sup>7</sup> McDONOUGH, JAMES V. Admitted to Philadelphia Bar in 1863 and practiced law there for many years. See *Martin's Bench and Bar*.

<sup>8</sup> BROOKE, CHARLES WALLACE. (1836-1897.) Born Philadelphia of Irish ancestry. Educated at Protestant Episcopal Academy in Philadelphia and at the University of Pennsylvania. Studied law and was admitted to practice 1858. He was called the "wit of the Philadelphia Bar." Was popular socially and as a lecturer and fond of amateur theatricals. He was counsel for the defense in many noted criminal trials. He removed to New York City in 1871 and became a member of the famous firm of Garvin, Fellows & Brooke. He had a remarkable gift of language and expression and ranked with the foremost of New York criminal lawyers. See *Prominent Pennsylvanians*, 2nd ser.; *Martin's Bench and Bar*; *Review of Reviews*, 1896; *History of Bench and Bar of New York*.

## THE EVIDENCE.

*W. W. Dougherty.* Am a City Alderman and witnessed a part of the fight at the election Jan. 12th last; saw Trainor pushing Eaton out of Smith's public house on the southeast corner of Fifth and Spruce streets; Eaton had his back to us, and Trainor his face towards us; Eaton had a pistol in his hand; after pushing him out as far as the curb, Heenan, the deceased, came to the door of Smith's house; he had been inside, and stood in the doorway; Eaton levelled a pistol at Heenan, whilst he was standing in the door, and Trainor threw up the pistol, which was pointed over his shoulder, and made the remark, "Not now;" Trainor backed Eaton up Fifth, across Spruce, over the other side, and a man named Ewing, who was drunk, started after Eaton and Trainor, over towards them; Heenan called Ewing back, and on the north side of Spruce street caught hold of Ewing and asked him to come back, trying to pull him back; after Eaton and Trainor had got up Fifth street, some twenty feet past Spruce street, and I was standing then on the southeast corner of Fifth and Spruce, there were two reports of a pistol; being in a line with it, I thought it was dangerous to stay there; crossed to the northwest corner, more towards the north than the west, looking at the parties who were firing, who were Eaton and Trainor both; who fired the first shot, don't know; the third shot was fired by Trainor, and the fourth by Eaton; at the time the fourth shot was fired Heenan was past

the corner of Fifth and Spruce, walking up Fifth after Ewing, Eaton and Trainor; Heenan at the fourth shot stopped for a second, and then started on to walk after them again, and said to them: "You d—d cuns, why don't you wait?" then some eight or ten shots were fired; got on the west side of the way, and found Nellis over there; walked alongside of him, and made a remark to him; then returned to where Heenan and Ewing were, and this time Eaton, Trainor, Nellis and some seven or eight altogether, ran up Fifth street; Nellis went up on the west side of the way, and all the others on the east side; Nellis did not run, but all the rest did; when I arrived on the east side, where Heenan and Ewing were, I took hold of Ewing for the purpose of getting him down towards Spruce street; he was very drunk and resisted; Heenan made a remark and went over to Smith's corner; there he was examined and found to be shot; procured Dr. Hutchinson, and then a carriage to take Heenan to the hospital; but we carried him there on a lounge, and he died there.

When Heenan came to the door of Smith's tavern, and Eaton had the pistol over Trainor's shoulder, Heenan said to Eaton: "Jerry, there is no use in using anything of that kind; I am not armed;" and he held up his hands to show that he was not; do not know that he was armed; he had no arms when he was taken to the hospital, for I searched his clothing and took away what money and articles of value he

had; remained with Heenan from the time I took him into the tavern until I took him to the hospital, except when I went for a carriage and doctor; we carried him on a lounge, as we thought it would be easier than a carriage; some twelve persons were with him when I left for the doctor and carriage; think Frank Nagle, Mr. Smith and Mr. Kelsh were there; no weapon was taken from his person during the time I was with him; did not see him have any weapon at the time of this occurrence.

Eaton fired the fourth shot and Trainor the third; can't be positive which hit Heenan out of the eight shots; when the fourth shot was fired Heenan stopped an instant, and then went on again; they were all standing in Fifth street, above Spruce, when these shots were fired, except Nellis, who was on the west side; the balance of the party, except Eaton and Trainor, were fifteen or twenty feet above, towards Spruce street; Eaton and Trainor were interposed between Heenan and Ewing and the rest of the party; Heenan was about twenty feet from Eaton and Trainor when the fourth shot was fired; after the fourth shot was fired, Eaton and Trainor both fired the other eight or ten shots; Trainor attempted to fire and his pistol snapped three times in succession; can't say if shots were fired by the balance of the party, who stood twenty feet away; after Eaton and Trainor had left and got up to the crowd, one or two shots were fired; a portion of the Venetian door was torn away as Trainor was putting Eaton out; it was a small Venetian summer door; it was possible to see over the top of the

door; an ordinary-sized man could look over it; that was the only door shut to; a man standing at that door could see who was in the tavern; say positively that Trainor fired the third shot and Eaton the fourth, and it was after the fourth shot that Heenan halted a moment and then went ahead; after the firing of the fourth shot Heenan went up Fifth street some ten, fifteen or twenty feet.

*Joseph R. Tatem.* Saw Heenan start across the street to get Ewing back; Heenan called to him to come back; by this time the crowd of eight or twelve had retreated up Fifth street; Heenan again got hold of Ewing, but he broke away again and ran up Fifth street, Heenan calling to him to come back, and ran after him; crossed from the west side to help Heenan to bring Ewing back; Ewing was very drunk; about the time I got over to Heenan to help him with Ewing the firing commenced; the third or fourth shot, ain't certain which, hit Mr. Heenan in the stomach as he was advancing along with me on the pavement after Ewing; suppose we were about ten yards from the party who shot us; think there was in the neighborhood of eight or ten shots fired; don't know who it was who fired the shots; I could not see who fired the shots; was very much excited at the time; when the fourth shot was fired Heenan flinched back, and then went ahead; he did not say anything until the firing was all over; the crowd all ran up Fifth street as fast as they could go after the firing; Heenan and I turned round and went back, and when at the northeast corner of Fifth and Spruce, Alderman

Dougherty ran over and said: "Tim, I think you are shot;" Heenan said: "Squire, I think I am; I will see when we get to the tavern;" on reaching the tavern Heenan opened his clothing and he was shot in the stomach; I saw the wound; went to the station-house to see if I knew any of the men arrested, and saw no more of Heenan until he was dead; Heenan had no weapon when I went to assist him in bringing Ewing back.

To the COURT. There was nothing in Heenan's hands when he opened them; he opened them at the tavern door.

Ewing had no weapon, and I don't think he knew anything about the firing, he was so drunk; he fell to the pavement when Heenan and I got up to him; the shots were fired from the east side, and fired down Fifth street toward Spruce in the direction where Heenan and Ewing were standing; when I first saw Eaton at Fifth and Prune streets, he had a pistol, knife, or black-jack

in his hand; it was something, but, being dark, I could not see it.

*Cross-examined.* The parties firing and the deceased were, I think, further up Fifth street than Alderman Dougherty stated; my mind was fixed on saving Ewing and myself, and this, with the darkness, prevented me from recognizing the parties firing; could not tell whether Heenan was drunk or sober, or whether he had been drinking.

To the COURT. When Alderman Dougherty reached Heenan and said, "Tim, you are shot," he replied, "I don't know;" and the Alderman said, "I know you are;" there was no noise at the time of the firing except Heenan calling to Ewing to come back.

*Mr. McDonough*, for the defense, called a number of witnesses, but they were of bad character, and had to acknowledge it on the stand. More than one of the witnesses had to be brought from prison to testify, he being a convict at the time.

After addresses to the jury by the *Counsel* for the Prisoner and the Commonwealth, the *jury* retired and in twenty minutes more they rendered a verdict of *Guilty of Murder in the First Degree*.

Motions for a new trial and in arrest of judgment were subsequently overruled, and the *Prisoner* sentenced to death.

### THE APPLICATION FOR MERCY.

When the death of Timothy Heenan was announced, a terrible feeling sprung up against Eaton. The deceased was the brother of John C. Heenan,<sup>9</sup> the celebrated pugilist, and

<sup>9</sup> HEENAN, JOHN CARMEL. Born West Troy, N. Y. 1833; served his apprenticeship in engineering in Troy, and at 18 went to San Francisco, where he soon found employment in the Benicia shops of the Pacific Mail Steamship Co., which gave him his nickname "the

all his friends swore vengeance against Eaton. They demanded that additional counsel other than the Commonwealth officers should be engaged, but District Attorney Sheppard refused to do so. Mr. Heenan was present at the trial, and seemed to manifest much interest in it, but his conduct in the courtroom was unexceptionable.

All the political friends of the prisoner began at once a strong movement to obtain a commutation of his sentence, and, knowing their own strength and influence in politics, they were confident of success. They brought numerous people, living and dead, to make affidavits and statements throwing the guilt upon others; they besieged the Governor and the Legislature, and to the last moment they were confident of success.

Eaton had the reputation of being a thief, though this his friends stoutly denied. He was an associate of professional

Benicia Boy." Afterwards he spent some time in the gold fields. As a youth he had developed an extraordinary aptitude for boxing and he figured in several sparring exhibitions on the Pacific Coast, and made such a reputation that in 1858 he challenged the then champion of the East, John Morrissey (1831-1878) who in later years became a State Senator and Congressman from New York, and who defeated him, through an accident, in a fight at Long Point, Canada. Morrissey declined a second fight and the American championship went to Heenan. Tow Sayers was then the champion pugilist of England and Heenan challenged him. The challenge was accepted, and the contest became an international event. The men met on April 17, 1860, at Farnborough, about 30 miles from London, in the presence of over 12,000 spectators. For months in England, among boys at school, in the universities, at clubs, in military circles, in the lobbies of the Houses of Parliament, on the stock exchange and indeed everywhere, the great prize fight had been the topic of daily conversation. "Never perhaps in the history of the prize ring had such a representative crowd gathered together. There were men of letters, members of both houses of Parliament, including the Prime Minister Lord Palmerston, the cream of the artistic, literary, dramatic and musical world, and many of the foremost military men, and men of fashion of the day." Henning's "Fights for the Championship," p. 419. But the result was unsatisfactory as it ended in a draw, and champion belts were given to both contestants. Heenan returned to the United States; married Adah Isaacs Menken (1835-1866), a celebrated actress of the day, and came back to England in 1863 to fight the then champion, Tom King. King won after a long battle, and Heenan never entered the ring again.

thieves, and seemed to know, by intuition, the arrival of one of the fraternity in the city. In the event of the arrest of one of these characters, Eaton was the first man at the hearing, and did all the running about, with a view of obtaining bail.

### THE EXECUTION.

*April 8.*

The time fixed for the Sheriff, Jury and others who were called upon to attend the execution was half past 9 o'clock. As early as 9 o'clock a number of the gentlemen were present; at a quarter of 10, when the Sheriff arrived, all the jurors had assembled. The time was taken up in discussing the *pros* and *cons* of the case, and each person expressed a wish that a reprieve would arrive during the course of the morning. So anxious were all of them that Eaton should be respited, that they discussed how long it would take a special locomotive to run from Harrisburg to Philadelphia and bring a countermand to the order which was shortly to be carried into effect.

During the morning, each person inside the prison was going about in a dreadful state of suspense, at one time walking down the prison yard and looking at the instrument of death, and then passing along the inside corridor and gazing at Eaton's cell, but all the time expressing great sympathy for the condemned, and hoping that the reprieve would arrive by noon. Every time the bell at the prison gate rang, there was a general rush to the door, each face beaming with the hope that the ringer was a messenger of "glad tidings" to the dying man; but at last a gentleman arrived who informed Mr. Brooke that it was useless to hope for a reprieve. Mr. Brooke immediately repaired to Eaton's cell and informed him how matters stood and the impossibility of a respite arriving from Harrisburg. During all this time Mr. Brooke had kept up a conversation with the Sheriff, with a view, it was thought, of getting the time of the execution postponed as late as was possible.

Precisely at half past 12, Sheriff Lyle called the jury into the keeper's office, and requested his deputy to call the roll

of the jurors and then read the death warrant. All the jurors answering to their names, the reading of the death warrant was proceeded with. Gen. Lyle, at twenty-five minutes to 1 o'clock, went to the cell of Eaton and informed him that the time had arrived when he was to meet his fate. Eaton replied, "It is an unpleasant duty you have to perform, but you must do your duty." When the procession emerged from the prison, Eaton walked firmly and did not exhibit any emotion. He kept kissing the crucifix in his hands, and repeating the responses after his confessors during the whole of that walk, and no sound was heard save the tread of the walking multitude. At the end was the gallows upon which Spring,<sup>10</sup> Winemore, Probst,<sup>11</sup> and others suffered the extreme penalty of the law for their bloody crimes. Father Barry ascended the steps, followed by Eaton, who walked in a firm manner, Father O'Reilly, the Sheriff, and the carpenter who was employed to erect the gallows. Eaton stood in the center of the plank, his confessors on either side, Sheriff Lyle at the top of the steps, and the carpenter behind. Eaton's hair was carefully arranged, but the wind blew it from one side of his head to the other. He was dressed in a black cloth sack coat, double-breasted velvet vest, snuff-colored trousers, top boots, white shirt and collar, and a black necktie. His white pocket handkerchief was hanging half out of his coat pocket.

The Sheriff inquired if he wished to say anything before dying, whereupon he protested his innocence again and again, and said, as he hoped to meet his Maker, he never fired a shot on that fatal night. He was then handcuffed and the noose placed around his neck. The Sheriff then drew from his pocket the white cap, placed it over the head of Eaton, and descended from the scaffold. The rope attached to the drop was brought across the yard, the end being put into a cellar close by, and at ten minutes to 1 o'clock the drop fell. Eaton did not struggle once, indicating that he died an easy death.

In compliance with a request from Eaton's relatives, no

<sup>10</sup> See 7 Am. St. Tr.

<sup>11</sup> See 8 Am. St. Tr.



post-mortem examination was made, and his body was handed over to his friends, who started, as they said, to convey it to an undertaker's. Instead of conveying the body to an undertaker, it was driven rapidly to a medical college in South Ninth street, and an attempt was made at resuscitation. The galvanic battery was applied, and mustard was used, besides rolling. But after two hours' manipulation of the body, his friends gave it up and the body was consigned to the grave.

## THE TRIAL OF JOSEPH PULFORD FOR KIDNAPPING, NEW YORK CITY, 1819.

### THE NARRATIVE.

Long before the Northern abolitionist began to inveigle Southern blacks from their homes, in order to give them freedom, there were people in the North who were engaged in the same illegal business, but in this case it was to make slaves of free negroes. The practice must have been frequent, for there was a statute of New York State directed not against kidnapping in general but against "any one who should, without due process of law, seize and forcibly confine or inveigle or kidnap any negro, mulatto, mustee, or other person of color, with intent to send or carry him out of this State." Joseph Pulford was indicted, convicted and sentenced to a long term of imprisonment for this offense, and his trial shows the methods employed in such a trade as well as its extent.

### THE TRIAL.<sup>1</sup>

*In the Court of General Sessions, New York City, December, 1819.*

CADWALLADER D. COLDEN,<sup>2</sup> *Mayor.*

*December 8.*

The prisoner had been previously indicted under the statute for inveigling and kidnapping Mary Underhill, with intent to send her out of the State to Havana in the Island of Cuba. The date was placed at November 28, 1818. The statute is in these words:

"That if any person shall, without due process of law, seize and forcibly confine, or inveigle, or kidnap any negro, mulatto, mustee, or other person of color, with intent to send or carry him out of this State; or shall conspire with any person or persons, or aid, abet, assist, hire, command or procure any other person to commit the said

<sup>1</sup> \*New York City Hall Recorder, see 1 Am. St. Tr. 61.

<sup>2</sup> See 1 Am. St. Tr. 6.

offense, or any captain of a vessel, or other person, shall sell or dispose of, in any foreign port or place, any negro, mulatto, mustee, or other person of color, with intent to send or carry him out of this state, or shall conspire with any person or persons, or aid, abet, assist, hire, command or procure any other person to commit the said offense, or any captain of a vessel or other person shall sell or dispose of in any foreign part or place, any negro, mulatto, mustee or other person of color, and shall be duly convicted of any of the said offenses, before any court of oyer and terminer or general sessions of the peace, of any county in this State, shall be fined or imprisoned, or both, in the discretion of the court before which such conviction shall be had; such fine to be not less than one thousand dollars, nor more than two thousand dollars; such imprisonment to be in the State prison, at hard labor, for any term not exceeding fourteen years."

*Mr. Van Wyck*,<sup>3</sup> for the People.

*Dr. Graham*<sup>4</sup> and *Mr. Scott*,<sup>5</sup> for the Prisoner.

#### THE EVIDENCE.

Previous to the day laid in the indictment, the prisoner had been making overtures for the sale of a woman of color to the captain of a vessel, lying at the foot of Rector street, about to sail for the Havanna. Mary Underhill, named in the indictment, was a free black woman, at service in a house in Franklin street. The prisoner had an interview with her, and offered to get her a place worth \$100 a year; and at the same time told her "To keep dark and say nothing." He requested her to get ready on the following Sunday evening when he would call and go with her to the place. Accordingly she prepared at the time appointed, and the prisoner came. He conducted her near the place where the vessel lay, and left her for the purpose, as he said, of going to see the captain; telling her, that if any one asked her what she

was waiting for, to say that she was waiting for her husband. She stayed there a considerable time, when he returned and told her that the captain had not come, and then conducted her into an alley, where he told her to call him master, in presence of the persons she might see, and that he was going to take her on board of the vessel, and pretend to sell her to the captain, and would give her one-half of the money. He further instructed her to go into the cabin, and come out again on deck, and while the captain should go into the cabin, she should jump off of the vessel and run away. After giving her these instructions he left her, and went to see the captain.

Previous to this time, the captain had represented the affair to Henry I. Hassey, who procured John C. Gillen, a constable of the second ward, and with him

<sup>3</sup> See 4 Am. St. Tr. 549.

<sup>4</sup> See *Id.* 854.

<sup>5</sup> See 2 Am. St. Tr. 172, 918.

concerted measures for the complete detection of the prisoner. When he came, the captain, in pursuance of a preconcert, introduced to the prisoner Gillen, as a merchant from the Havanna, by the name of Johnson, in want of negroes. Gillen, under the fictitious character he had assumed, represented that he had forty negroes on board, and wanted two more to complete his complement. The prisoner said, that the one he had brought down that evening made thirty which he had taken. He said she was a good one, and weighed one hundred and fifty weight. His price was fifty dollars; and when inquired of where she was, he said she was close by. The pretended purchaser wished him to bring her down; but this he was unwilling to do, until the money was paid, asserting, that he had been taken in too often in that way. The parties disputed and cavilled much; merchant Johnson affirmed, that he would not "buy a pig in the poke," and solicited the prisoner to bring her down,

and cautioned him against speaking so loud, as it was dangerous business. The prisoner said, that he could get two more before ten o'clock at night; that he generally procured them in Bancker street, but that this one was from Kingston, in the country.

At length the prisoner took merchant Johnson into the alley, and showed him the black woman, whom he examined, and judged she was of the weight represented. He took out his pocket-book and was paying the fifty dollars, which the prisoner expected, and was anxious to receive; but when a receipt was required, a fresh difficulty arose, and suddenly the merchant Johnson was metamorphosed into John C. Gillen, a constable. He said, "You must go along with me!" This made the prisoner look foolish, and say, "Oh, you're a joking." Both the prisoner and Mary Underhill were taken to the police. In giving her testimony on the trial, she appeared to be extremely simple and ignorant.

The *Counsel for the Prisoner* contended to the Court and jury that he ought not to be convicted, because no force was employed in kidnapping the woman, nor was she taken against her will.

The MAYOR, in his charge to the jury, said that such an atrocious transaction, as was disclosed by the testimony in this case, was calculated to rouse the most indignant feelings toward the perpetrator; but it was their duty to suppress those feelings, and preserve the utmost calmness in their deliberations.

The prisoner was indicted under a statute of our State, recently passed, for the protection of that race of people, who, by the injustice of our ancestors, had originally been brought to our shores. For among the humane and enlight-

ened part of mankind, it was now considered that the introduction of these people of color, as slaves, was founded in cruelty and injustice.

It is contended in this case, on behalf of the prisoner, that under this act it is necessary to show that the person alleged to have been kidnapped was, "without due process of law, seized and forcibly confined." But this, in the opinion of the Court, is not necessary; it is sufficient if such person was inveigled or kidnapped with an intent to send or carry him or her out of this State. To constitute kidnapping or inveigling, no force is necessary; for, no doubt, these terms import any inducement, by fraud or covin, calculated to accomplish the object against which the statute was passed to prevent.

The MAYOR here went into an examination of the testimony of Mary Underhill. Her testimony, he said, was unimpeached, except, perhaps, by her extreme simplicity and ignorance; and, no doubt, for that reason, the prisoner selected her as a fit object by which he might accomplish his nefarious design. Should the jury believe her story, corroborated as it is by the testimony of Hassey and Gillen, the Mayor did not hesitate to instruct the jury that this was as clear a case of kidnapping and inveigling under the act as could be conceived. With regard to the law, there could be no question.

The *Jury* convicted the *Prisoner*.

The MAYOR said, that if the prisoner's own declaration, as it appeared in evidence, was to be believed, he was an habitual kidnapper—he was a dealer in human flesh; and such was the turpitude of his offense, that if the law would permit, he deserved to be executed. The Court intended to inflict a punishment to the extent of their power; and, so far as depended on them, no expectation of mercy, no release from imprisonment, need be cherished by him.

The sentence and judgment of the Court is, that you, Joseph Pulford, be confined in the State Prison of the Southern District of the State of New York, at hard labor, for the term of fourteen years.

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